Supreme Court, U.S.
FILED

961732 APR 28 1997

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1996

MCDANIEL JACKSON and MIRIAM JACKSON,

Petitioners,

v.

IN RE: PRUDENTIAL SECURITIES INCORPORATED LIMITED PARTNERSHIP LITIGATION, MDL DOCKET NO. 1005,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

JEROME HOWARD FERGUSON
Counsel of Record for Petitioners
FERGUSON & COMPANY, P.C.
300 Embassy Court
624 North Good-Latimer Expressway
Dallas, Texas 75204-5850
Telephone 214/824-5555
Fax 214/823-3888

DOUGLAS D. DARNOLD
FERGUSON & COMPANY, P.C.
Dallas, Texas
Of Counsel

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

140 pp

QUESTIONS PRESENTED

1. Whether due process was denied the Petitioners, in that notice of class action *pendency* and of *opt-out rights* was *not* given to the last-known address of the Petitioners nor their counsel, contrary to the *individual notice* and "reasonable effort" required for due process and required by the District Court's Orders governing class notice, although the Respondents knew the address used for the Petitioners was not accurate, knew the Petitioners' accurate mailing address, and knew that the Petitioners were represented by counsel in a pending arbitration against the Respondents.

2. Whether due process was denied the Petitioners, in that the proceedings below incorrectly evaluated the adequacy of the giving of notice to the Petitioners, as to class *pendency* and class *opt-out rights*, by the more lenient notice standards of *settlement*.

3. Whether the Circuit Court of Appeals erred by its use of an "abuse of discretion" standard, instead of making a *de novo* review of the Petitioners' Fed. R. Civ. P. 60 (b)(4) Motion, which Motion alleged the class Final Judgment was void, as to the Petitioners, because due process was not provided to the Petitioners in that *no* notice of class action *pendency* nor of *opt-out rights* was given to the Petitioners' last-known address.

LIST OF PARTIES

Petitioners:

McDaniel Jackson, being the same person also known as "MacDaniel Jackson" and "Mac Jackson", and his spouse, Miriam Jackson.

Respondents:

Prudential Securities Incorporated

Class Plaintiffs in *In re: Prudential Securities Incorporated Limited Partnership Litigation*, Southern District of New York, MDL Docket No. 1005.

LIST OF PARENT COMPANIES

This document is filed on behalf of Petitioners, who are natural persons. As to Petitioners, there is no parent nor subsidiary company to be listed.

The parent company of Respondent, Prudential Securities Incorporated, is Prudential Insurance Company of America.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

LIST OF PARENT COMPANIES..... ii

TABLE OF CONTENTS..... iii

TABLE OF CITED AUTHORITIES..... iv, v, vi, vii, viii

PETITION FOR WRIT OF CERTIORARI..... 1

CITATIONS OF REPORTS BELOW 1

JURISDICTION..... 2

CONSTITUTIONAL PROVISIONS INVOLVED..... 3

STATEMENT OF THE CASE..... 3

JURISDICTION BELOW 3

FACTS 5

REASONS FOR GRANTING THE PETITION 10

QUESTION I..... 10

QUESTION II 20

QUESTION III..... 25

APPENDIX.....App. 1

TABLE OF CITED AUTHORITIES

Page

Constitutional Provisions

United States Constitution, Amendment V. 3

United States Constitution, Amendment XIV, § 1 3

Cases

Ackermann v. U.S., 340 U.S. 193 (1950). 26

Bass v. Hoagland, 172 F.2d 205 (5th Cir. 1949), *cert. den.*, 338 U.S. 816 (1949) 29

Berland v. Mack, 48 F.R.D. 121 (S.D.N.Y. 1969) 14

Breslow v. Prudential-Bache Properties, Inc., No. 91-C-1230, 1994 WL 478611 (N.D. Ill. Sept. 1, 1994) 25

Burns v. City of Dallas, No. CA-3-94-CV-2770-R, 1997 WL 118424 (N.D. Tex. March 12, 1997). 19

Chambers v. Armontrout, 16 F.3d 257 (8th Cir. 1994) 29

Covey v. Somers, 351 U.S. 141 (1956). 19

Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974) 11, 13, 19

Export Group v. Reef Industries, 54 F.3d 1466 (9th Cir. 1995) 29

FDIC v. Aaronian, 93 F.3d 636 (9th Cir. 1996) 30

Greene v. Lindsey, 456 U.S. 444 (1982). 14

Greenfield v. Villager Industries, Inc., 483 F.2d 824 (3rd Cir. 1973), *reh'g. denied*, 483 F.2d 824 at 834 (1973) 15, 16

Grievance Committee for the Southern District of New York v. Polur, 67 F.3d 3 (2nd Cir. 1995), *cert. den.*, ___ U.S. ___, 116 S. Ct. 1692 (1996) 19

TABLE OF CITED AUTHORITIES – Continued

Page

Grunin v. International House of Pancakes, 513 F.2d 114 (8th Cir. 1975), *cert. den.*, 423 U.S. 864 (1975) 21

Gutt v. United States, 641 F. Supp. 603 (W.D. Va. 1986) 20

In re Center Wholesale, Inc., 759 F.2d 1440 (9th Cir. 1985) 29

In re Four Seasons Securities Law Litigation, 502 F.2d 834 (10th Cir. 1974), *cert. den.*, 419 U.S. 1034 (1974) 29

In re National Student Marketing Litigation v. The Barnes Plaintiffs, 530 F.2d 1012 (D.C.Cir. 1976) 4

In re Nissan Motor Corporation Antitrust Litigation, 552 F.2d 1088 (5th Cir. 1977) 14, 15

In re Prudential Bache Energy Income Partnerships Securities Litigation, MDL Docket No. 888 (E.D. La.) 6

In re Prudential Securities Inc. Limited Partnership Litigation, No. 95-9209 (L), 1996 WL 739258 (2nd Cir. Dec. 27, 1996) 1

In re Prudential Securities Inc. Limited Partnerships Litigation, MDL No. 1005, M-21-67 (MP), 1995 WL 798907 (S.D.N.Y. Nov. 20, 1995) 2, 3, 6, 13

In re Prudential Securities Incorporated Limited Partnerships Litigation, 163 F.R.D. 200 (S.D.N.Y. 1995) 2

In re Prudential Securities Incorporated Limited Partnerships Litigation, 164 F.R.D. 362 (S.D.N.Y. 1996) 2

In re VMS Limited Partnership Securities Litigation, No. 90-C-2412, 1995 WL 355722 (N.D. Ill. June 12, 1995) 23

TABLE OF CITED AUTHORITIES – Continued

Page

Jordon v. Gilligan, 500 F.2d 701 (6th Cir. 1974), *cert. den.*, 421 U.S. 991 (1975) 29

Klapprott v. U.S., 335 U.S. 601 (1949) 26

Martella v. Marine Cooks & Stewards Union, 448 F.2d 729 (9th Cir. 1971), *cert. den.*, 405 U.S. 974 (1972) 26

Mennonite Board of Missions v. Adams, 462 U.S. 791 (1983) 14

Montgomery v. Scott, 802 F. Supp. 930 (W.D.N.Y. 1992) 19

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) 10, 13, 19, 29

New York Life Insurance Company v. Brown, 84 F.3d 137 (5th Cir. 1996) 29

Oppenheimer Fund v. Sanders, 437 U.S. 340 (1978) 14

Orner v. Shalala, 30 F.3d 1307 (10th Cir. 1994) 29

Peters v. National Railroad Passenger Corporation, 966 F.2d 1483 (D.C. Cir. 1992) 16

Phillips Petroleum Company v. Shutts, 472 U.S. 797 (1985) 12

Pittston Co. v. Reeves, 263 F.2d 328 (7th Cir. 1959) 28

Plotkin v. Pacific Telephone and Telegraph Company, 688 F.2d 1291 (9th Cir. 1982) 4

Robinson v. Hanrahan, 409 U.S. 38 (1972) 19

Sagers v. Yellow Freight Systems, Inc., 68 F.R.D. 686 (N.D. Ga. 1975), *aff'd.*, 529 F.2d 721 (5th Cir. 1976) 28

Seals v. Nicholl, 378 F. Supp. 172 (N.D. Ill. 1973) 20

TABLE OF CITED AUTHORITIES – Continued

Page

Silber v. Mabon, 18 F.3d 1449 (9th Cir. 1994) 24

Simer v. Rios, 661 F.2d 655 (7th Cir. 1981), *cert. den.*, 456 U.S. 917 (1982) 28

Small Engine Shop, Inc. v. Cascio, 878 F.2d 883 (5th Cir. 1989) 14

Supermarkets General Corp. v. Grinnell Corp., 490 F.2d 1183 (2nd Cir. 1974), *aff'd. sub nom. Manhattan-Ward, Inc. v. Grinnell Corp.*, 490 F.2d 1183 (2nd Cir. 1974) 27

Textile Banking Company, Inc. v. Rentschler, 657 F.2d 844 (7th Cir. 1981) 29

Torres v. $36,256.80 U.S. Currency, 25 F.3d 1154 (2nd Cir. 1994) 19

Trist v. First Federal Savings & Loan Association of Chester, 89 F.R.D. 1 (E.D. Pa. 1980) 22, 23

U.S. v. Giraldo, 45 F.3d 509 (1st Cir. 1995) 19

VTA Inc. v. Airco, 597 F.2d 220 (10th Cir. 1979) 30

Weigner v. City of New York, 852 F.2d 646 (2nd Cir. 1988), *cert. den.*, 488 U.S. 1005 (1989) 24

Weinberger v. Kendrick, 698 F.2d 61 (2nd Cir. 1982), *cert. den. sub nom. Coyne v. Weinberger*, 464 U.S. 818 (1983) 24

STATUTES AND RULES

18 U.S.C. § 1961 *et seq.* 3, 4

28 U.S.C. § 1254(1) 3

28 U.S.C. § 1291 4

TABLE OF CITED AUTHORITIES – Continued

Page

28 U.S.C. § 1292(a)(1) 4

28 U.S.C. § 1367(a) 4

Sup. Ct. R. 13 3

Sup. Ct. R. 30.1 3

Fed. R. App. P. 4(a)(1) 4

Fed. R. Civ. P. 6(b)(2) 27

Fed. R. Civ. P. 23(b)(3) 11, 12, 21

Fed. R. Civ. P. 23(c)(2) ..... *passim*

Fed. R. Civ. P. 23(e) 20, 21, 22, 23, 28

Fed. R. Civ. P. 60(b)(1) 26, 27

Fed. R. Civ. P. 60(b)(4) ..... *passim*

TREATISES AND OTHER MATERIALS

H. Newberg, *Class Actions* (1992) 12

C. Wright, A. Miller and M. Kane, *Federal Practice and Procedure* (1995) 26, 28

PETITION FOR WRIT OF CERTIORARI

Petitioners, McDaniel Jackson, being the same person also known as "MacDaniel Jackson" and "Mac Jackson", and his spouse, Miriam Jackson, respectfully make this Petition for this Court's grant of a Writ of Certiorari to review the decision of the United States Court of Appeals for the Second Circuit in this case.

CITATIONS OF REPORTS BELOW

The Summary Order of the United States Court of Appeals for the Second Circuit that gave rise to this Petition is unpublished in the Federal Reporter, pursuant to the Summary Order. The Summary Order is referenced in a "Table of Decisions without Reported Opinions" at 107 F.3d 4. The Summary Order is unofficially reported as *In re Prudential Securities Inc. Limited Partnership Litigation*, No. 95-9209 (L), 1996 WL 739258 (2nd Cir. Dec. 27, 1996). The Summary Order is reprinted at App. Toland 1.[1]

---

[1] By reference at Page 1 of the Appendix to this Petition, Petitioners have incorporated the contents of the Appendix, page numbers App. i through App. 67, of a Petition for Writ of Certiorari under Docket No. 96-1538, JOHN D. TOLAND AND CHRISTAL TOLAND v. IN RE: PRUDENTIAL SECURITIES INCORPORATED LIMITED PARTNERSHIP LITIGATION, MDL DOCKET NO. 1005 (the "Toland Petition"), which Toland Petition was filed with this Court on or about March 27, 1997.

In the Jacksons' instant Petition: (1) References to the Toland Petition are indicated as "Toland Petition", followed by page number citation; (2) References to documents in the Appendix of the Toland Petition are indicated as "App. Toland", followed by page number citation; and (3) References to the

The District Court's Opinion, supplementing its individual Orders denying opt-outs of various Movants, including Petitioners, is *In re Prudential Securities Incorporated Limited Partnerships Litigation*, 164 F.R.D. 362 (S.D.N.Y. 1996). The Opinion is reprinted at App. Jackson 42.

The District Court's Findings of Fact and Conclusions of Law are unreported in the Federal Supplement, but are reported unofficially as *In re Prudential Securities Inc. Limited Partnerships Litigation*, MDL No. 1005, M-21-67 (MP), 1995 WL 798907 (S.D.N.Y. Nov. 20, 1995) (herein, *"Findings of Fact and Conclusions of Law"*).

The District Court's Opinion which in part directed notice to be provided to absent class members, granted preliminary approval of the settlement and scheduled a fairness hearing, is *In re Prudential Securities Incorporated Limited Partnerships Litigation*, 163 F.R.D. 200 (S.D.N.Y. 1995). The Opinion is reprinted at App. Jackson 14.

JURISDICTION

The United States Court of Appeals for the Second Circuit entered judgment on December 27, 1996. App. Toland 3.

Petitioners timely filed their Petition for Rehearing in the Second Circuit, which the Second Circuit denied by Order entered January 27, 1997. App. Toland 58. Pursuant

---

documents in the Appendix attached hereto are indicated as "App. Jackson", followed by page number citation.

to Sup. Ct. R. 13 and 30.1, this instant Petition is timely, having been filed within ninety (90) days from the Second Circuit's denial of the Petition for Rehearing, as extended by Sup. Ct. R. 30.1.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V (Due Process Clause)

"No person . . . nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; . . . "

Amendment XIV, § 1 (Due Process Clause)

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Jurisdiction Below

The Consolidated Complaint alleged violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.*, as violations of RICO §§ 1962(a), (c) and (d). *Findings of Fact and Conclusions of*

Law, supra, 1995 WL 798907, at *2-*4. As to RICO allegations, jurisdiction of the District Court is conferred by 18 U.S.C. § 1964. The Consolidated Complaint also alleged common law claims. As stated in the Consolidated Complaint, the District Court has supplemental jurisdiction as to the common law claims pursuant to 28 U.S.C § 1367(a). Toland Petition 3-4.

The Court of Appeals for the Second Circuit had jurisdiction pursuant to 28 U.S.C. § 1291. Petitioners appealed to the Second Circuit from the District Court's denial of Petitioners' Motion for Relief made pursuant to Fed. R. Civ. P. 60(b)(4). App. Toland 45, 48. App. Jackson 38, 64, 70. Denial of such a motion is appealable as a final judgment. *Plotkin v. Pacific Telephone and Telegraph Company,* 688 F.2d 1291 (9th Cir. 1982); *In re National Student Marketing Litigation v. The Barnes Plaintiffs,* 530 F.2d 1012, at 1014, n.5 (D.C.Cir. 1976). The class Order and Final Judgment from which Petitioners' Motion sought relief contains injunctive provisions. App. Toland 39. Thus, the Circuit Court of Appeals also had jurisdiction pursuant to 28 U.S.C. § 1292(a)(1).

Notice of Appeal to the Court of Appeals for the Second Circuit was timely filed by Petitioners with the District Court on February 5, 1996, which was within thirty (30) days of the date of the District Court's Order No. 44 denying Petitioners' relief, as required by Fed. R. App. P. 4(a)(1). App. Toland 45. The District Court's Order No. 44 denying Petitioners' Motion for Relief from the class Final Judgment and Order was entered January 19, 1996. App. Jackson 38.

Petitioners' appeal included appeal from the District Court's said Order No. 44 which denied Petitioners' Motion for relief from the class Final Judgment, and Petitioners' appeal from the District Court's Order entered November 20, 1995, which was the class Order and Final Judgment containing claims settlement, injunctive and other provisions. App. Toland 34, 39, 45; App. Jackson 38.

The Court of Appeals for the Second Circuit entered its Order, having the effect of dismissing Petitioners' appeal from the November 20, 1995 underlying class Order and Final Judgment, by the Second Circuit's Order dated December 3, 1996. App. Toland 56. Petitioners' appeal, from District Court Order No. 44 which had denied them relief from the class Order and Final Judgment, was denied by the Second Circuit's Summary Order entered December 27, 1996. App. Toland 3, 10-11. Petitioners timely filed their Petition for Rehearing in the Circuit Court of Appeals, and have timely filed this Petition for Writ of Certiorari, as stated in "Jurisdiction", *supra*.

Facts

This case arises from a massive securities class action against Respondent Prudential Securities Incorporated (herein, "Prudential") and others. The class action involves allegations of deception by Prudential, in a continuing scheme to defraud investors in the securities of 700 limited partnerships formed, controlled and sold by Prudential, allegedly raising over $7 billion in investor capital.

The Consolidated Complaint alleged *inter alia* that Prudential and other Defendants broadly, deliberately misled investors; "Carefully orchestrated" the misleading marketing of the securities, through a Prudential in-house department called "DIG"; and that Prudential's practices "intentionally concealed" critical facts. *Findings of Fact and Conclusions of Law,* 1995 WL 798907 at *3-*6. Shortly after the 1994 filing of the Consolidated Complaint, the United States Attorney for the Southern District of New York announced that Prudential had acknowledged criminal wrongdoing, in connection with sales of its "Energy Income" Partnerships (App. Jackson 18).

The Energy Income securities were the principal Partnerships bought by the Petitioners. The Petitioners invested approximately $300,000.00 into Energy Income securities. App. Jackson 81-83. During 1993-'94, a separate class action against Prudential in the Eastern District of Louisiana, *In re Prudential Bache Energy Income Partnerships Securities Litigation, MDL Docket No. 888,* was settled with Prudential. App. Toland 24-27. Petitioners effectively opted-out of that MDL-888 Louisiana class action, and were not and are not class members therein.

In January, 1995, Petitioners filed their arbitration claim against Prudential. Petitioners' arbitration covered Partnerships which were also covered by the instant class action, as well as claims concerning Prudential's destruction of documents and other property of the Petitioners. App. Jackson 40, 66. The arbitration was conducted vigorously by Prudential and the Petitioners throughout 1995, and final hearing was to be January, 1996. App. Jackson 66. Throughout the entire arbitration process, the first notice given to the Petitioners' counsel of this instant,

underlying class action, including the November 20, 1995 Order establishing the class, was by Prudential's employee lawyer's letter dated December 7, 1995. App. Jackson 66-67, 99-101.

Mr. Jackson had been an employee of Prudential in its Dallas, Texas office, until his employment was terminated in April, 1994. In November, 1994, Petitioners moved to their new Charlotte, North Carolina residence. Petitioners gave Prudential many notices of their changes of address, although Prudential continued to use, for Petitioners' mailing address, Petitioner Jackson's former place of employment, Prudential's own office address of 10440 North Central Expressway # 1600, Dallas, Texas 75231. App. Jackson 78-79.

To change another mailing address, which Prudential had used for mailing regular account statements, on January 3, 1995 Mr. Jackson gave Prudential a written notice, requesting address change to Petitioners' accurate North Carolina address. App. Jackson 80, 84. In the proceedings below, Prudential *has never denied* receipt of that January 3, 1995 notice. In the District Court, Prudential *admitted* its knowledge, during the class notice time period, that Petitioners maintained a correct mailing address, *different* from the Prudential office address used for Petitioners. App. Jackson 88-89.

In the instant underlying class action, on August 29, 1995, the District Court ordered Lead Class Counsel to identify, "with reasonable effort", all class members and to send them notice of pendency of the class action and of opt-out rights; The District Court further ordered Prudential to " . . . cooperate in making their books, records

and information available to Lead Class Counsel . . . " for that purpose. App. Jackson 7. The District Court's Opinion of the same date referred to the proposal of the "settling parties" to send the notice to each class member " . . . whose address can be reasonably located . . . ". App. Jackson 36.

An officer of Garden City Group, Inc., the Claims Administrator in the underlying class action ("Garden City Group") testified that seven (7) computer tapes prepared by and for Prudential, plus another tape, were used for the notice mailing. An unspecified person advised Garden City Group that the tapes contained transactional and address data for the Partnerships during the class period. App. Toland 28, 30.

From August to October, 1995, two computer tapes which included name and address changes were given by or on behalf of Prudential to Garden City Group. Unspecified in the Garden City Group officer's Affidavit is description of the effort used in, nor the source of, nor manner in which, the address change data might have been located, reviewed and assembled prior to recording onto the computer tapes. Also unspecified is whether Prudential, the Lead Class Counsel or others prepared the address change information, prior to its being placed onto the tapes. App. Toland 29, 31.

Prudential's counsel stated that the Dallas address used by Garden City Group for mailing notice of class pendency and of opt-out rights to Petitioners was provided to Garden City Group by *Prudential*. Prudential's counsel also stated that the Direct Investment Group ("DIG") database used was " . . . *considered by PSI* . . . "

(*i.e.*, Prudential) to be the best practicable source for identifying class members. Prudential's counsel's Affidavit is silent as to whether the DIG database was considered suitable for identifying class members' *addresses*. Prudential's counsel's Affidavit is silent as to whether any effort was used *by Lead Class Counsel*, to identify Petitioners and their accurate address. App. Jackson 86.

Notice of class pendency and of opt-out rights was sent to Petitioners at their incorrect former address, Prudential's own Dallas, Texas office address. App. Jackson 81-83. The mailing was finished by September 19, 1995. App. Toland 32. Prudential's Dallas in-house employee, Mr. Nittolo, testified in the District Court as to his general practice of forwarding mail to Petitioner Jackson; However Affiant Nittolo did not affirmatively state that he did send any Court-ordered notice of class pendency and of opt-out rights to Petitioners, nor any mailing date nor mailing address for Petitioners. App. Jackson 88-89.

After the class certification hearing on November 17, 1995, the District Court's Final Judgment defining and certifying the class, and enjoining class members from prosecuting any settled claims, was entered November 20, 1995. App. Toland 34, 36, 39.

Petitioners did not receive their first notice of the class' former pendency, nor of then-lapsed opt-out rights, until after that November hearing; *i.e.*, Petitioners received the notice December 7, 1995. App. Jackson 78. Petitioners filed their Motion, seeking Fed. R. Civ. P. 60(b)(4) relief and other relief, in the District Court thereafter. App. Jackson 70. All relief was denied Petitioners by the District Court's Order No. 44. App. Jackson 38.

Petitioners moved the District Court to reconsider Petitioners' Fed. R. Civ. P. 60(b)(4) Motion on due process grounds, in addition to alternate relief on reconsideration. App. Jackson 91, 93-94. Petitioners' Motion for Reconsideration was denied. Petitioners' appeal to the Second Circuit followed.

REASONS FOR GRANTING THE PETITION

I.

THE "BEST NOTICE PRACTICABLE" WAS NOT GIVEN PETITIONERS, AND "REASONABLE EFFORT" WAS NOT USED TO GIVE NOTICE OF PENDENCY AND OF OPT-OUT RIGHTS TO THEM

Petitioners were not given notice of the pendency of this class action, nor of their right to opt-out of any judgment to be entered therein depriving Petitioners of their property rights. No notice was given Petitioners which would meet the standard set forth in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) (hereinafter, "*Mullane*"):

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is *notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action* and afford them an opportunity to present their objections. (Citations omitted) . . .
>
> "But when notice is a person's due, *process which is a mere gesture is not due process.* The means employed must be such as *one desirous of*

actually informing the absentee might reasonably adapt to accomplish it. . . . "

. . . . .

"The trustee has on its books the names and addresses of the income beneficiaries . . . and we find no tenable ground for dispensing with *a serious effort to inform them personally of the accounting, at least by ordinary mail to the record addresses.* (Citation omitted) . . . " 339 U.S. at 314-315, 318. (emphasis added)

The instant underlying class action was certified by the District Court pursuant to Fed. R. Civ. P. 23(b)(3). App. Jackson 3, 28, 31, 36; App. Toland 34-36. Thus, Rule 23(c)(2) requires the following notice:

"In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class *the best notice practicable, including individual notice to all members who can be identified through reasonable effort . . . "* (emphasis added)

As to such notice of the pendency and of the right to opt-out, *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974) (hereinafter, *"Eisen"*) applied that rule to a class of 2,250,000 members, whose names and addresses could be determined by comparison of two different series of computerized records. 417 U.S. 166-167, at note 5. Presented with a scheme of individual notice to some class members, and publication notice in the *Wall Street Journal* and other periodicals, this Court stated:

" . . . We think the import of this language [Rule 23(c)(2)] is unmistakable. Individual notice must be sent to all class members whose names

and addresses may be ascertained through reasonable effort.

"The Advisory Committee's Note to Rule 23 reinforces this conclusion. See 28 U.S.C. App., p. 7765. The Advisory Committee described subdivision (c)(2) as 'not merely discretionary' and added that the 'mandatory notice pursuant to subdivision (c)(2) . . . is designed to fulfill requirements of due process to which the class action procedure is of course subject.' (citation omitted) . . .

. . . . .

" . . . *individual notice to identifiable class members is not a discretionary consideration to be waived in a particular case. It is, rather, an unambiguous requirement of Rule* 23. . . . " 417 U.S. at 173, 176. (emphasis added)

This Court reinforced the preceding requirements in the more recent case of *Phillips Petroleum Company v. Shutts*, 472 U.S. 797 (1985) (Rehnquist, J.) (opinion hereinafter cited as "*Phillips Petroleum*").[2] In describing the "minimal procedural due process protection" (472 U.S. at 811-812) with which an absent plaintiff must be provided, in a suit concerning a claim for money damages or similar

---

[2] Although involving the Kansas state class action statute, that state statute and its first-class mailing procedure for notice of pendency and opt-out rights, described at 472 U.S. 811, are substantially identical to Fed. R. Civ. P. 23(b)(3) and 23(c)(2). 1 H. Newberg, *Class Actions*, § 1.16 (1992); *Phillips Petroleum, supra*, 472 U.S. at 814, note 5.

relief at law, such as the instant underlying class action,[3] this Court, in addition to restating the *Mullane* requirement that reasonable notice *must* be given, then stated that the notice must indeed be given *and received*:

> "The plaintiff *must receive notice* plus an opportunity to be heard and participate . . . Additionally, we hold that due process requires at a minimum that an absent plaintiff *be provided* with an opportunity to remove himself from the class . . . " 472 U.S. at 812. (emphasis added)

The Circuit Court of Appeals in these proceedings erroneously did *not* reach Petitioners' due process grounds, which will be discussed in Point III, *infra*. The Circuit Court affirmed in full the District Court's Orders, which erroneously stated that notice of pendency and opt-out rights *need not actually be received*, if the notice had been properly given. App. Jackson 38, 57-58. Thus, the District Court applied a legal standard, as to Petitioners, inaccurate according to *Phillips Petroleum, supra*.[4]

---

[3] *Cf. Findings of Fact and Conclusions of Law* herein, 1995 WL 798907, at *14:

> "The fourth and fifth factors discussed in *Grinnell* relate to the risk faced by the class in establishing liability and damages . . . Similarly, *there are always risks to establishing damages. Thus, the Court finds that this Grinnell factor supports the Settlement.* (footnote omitted)" (emphasis added)

[4] It should be sufficient to note briefly that, as to a known intended recipient such as the Petitioners, with a known residence address, *no* type of *newspaper publication notice*, as to class pendency nor opt-out rights, should be considered sufficient, *cf.* App. Jackson 86-87. As to such known persons of known address, publication notice will not pass Constitutional muster. *Mullane*, 339 U.S. at 318; *Eisen*, 417 U.S. at 174-'75.

Applying the above principles, rigorous steps to provide due process in mailing notice of class pendency and of class opt-out rights, or prior to the deprivation of other property rights, have been required in the following cases. Those requirements include: Mailed notice, where other steps, short of mailing, fail " . . . (i)n a significant number of instances . . . " to produce actual notice, *Greene v. Lindsey*, 456 U.S. 444, 453 (1982); The "ascertainment" of a mortgagee's address "by reasonably diligent efforts", although only the mortgagee's name, minus the address, was contained in public records, *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 798 at note 4 (1983); "Reasonable diligence" required, *to identify the person who is actually subject* to deprivation of property, *Small Engine Shop, Inc. v. Cascio*, 878 F.2d 883, 893 at note 9 (5th Cir. 1989); "Reasonable effort" through manual examination of 1,700,000 "RDR" index cards to identify names and addresses, *In re Nissan Motor Corporation Antitrust Litigation*, 552 F.2d 1088, 1094, 1096-1100 (5th Cir. 1977) (hereinafter, "*In re Nissan*"); An apparent manual examination of "transfer sheets" kept by a transfer agent, to identify names and addresses of approximately 16,007 shareholders, *Berland v. Mack*, 48 F.R.D. 121, 129 (S.D.N.Y. 1969); and manual sorting of a "considerable volume" of paper records, key-punching of 150,000 to 300,000 computer cards and creation of other new computer programs, *Oppenheimer Fund v. Sanders*, 437 U.S. 340, 345, 359-360 (1978).

The practical application of the "reasonable effort" standard, enforced in the case of a large class action with numerous putative class members such as the instant

Prudential proceeding, was characterized in *In re Nissan, supra,* as follows:

> "Here, we know that the RDR cards provide the court with the best available listing of the names and addresses of all class members. Indeed, the parties agree on this. *They only shy from undertaking the effort. While the search cannot be made with push-button ease, its advantages bring the effort required within the range of reasonableness.*
>
> . . . .
>
> "When the chore of examining defendants' RDR cards is juxtaposed to the efforts required to identify the *Eisen* class members, it pales by comparison. The district court's characterization of the undertaking here as 'herculean' is accurate only in relation to the class's size. *The key, though, is reasonable effort, and a large class requires a large effort.* Subdivision (c)(2) mandates that each class member be given 'the best notice practicable under the circumstances'. While the mechanical process of examining the cards may prove to be expensive and time-consuming, *the individual right of absentee class members to due process makes the cost and effort reasonable."* 552 F.2d at 1099-1100. (emphasis added)

As stated in *Greenfield v. Villager Industries, Inc.*, 483 F.2d 824, 831-832 (3rd Cir. 1973), *rehearing den.* 483 F.2d 824 at 834 (1973) (hereinafter, *"Villager"*):

> "A procedure such as the class action, which has a formidable, if not irretrievable, effect on substantive rights, can comport with constitutional standards of due process *only if*

> *there is a maximum opportunity for notice to the absentee class member . . .*
>
> "Given that class action procedures are conceptualized as an exception to the general rule that only parties to a lawsuit are legally bound- . . . the procedure can be tolerated, if not completely justified, (footnote omitted) *only if there is fealty to both the spirit and the letter of the procedural rules, especially those relating to notice.* Responsibility for compliance is placed primarily upon the active participants in the lawsuit, especially upon counsel for the class . . . " (emphasis added)

In these proceedings as to Petitioners, there is *no evidence* of any effort, and *no evidence* of any "reasonable effort", neither by Lead Class Counsel nor Prudential, to identify Petitioners at their accurate address which was previously given by Petitioners to Prudential, nor to give them notice, at that accurate address, of class pendency nor of their opt-out rights.

No "reasonable effort" was used, by Lead Class Counsel nor Prudential, to identify Petitioners' accurate address. (" . . . the deed did not match the promise." *Villager, supra,* 483 F.2d at 830). First, the address which actually was used by Lead Class Counsel's Claims Administrator, for the computerized mailing addresses on the notices (App. Jackson 81-83), was *clearly the address of Prudential's own office, not a residence address for Petitioners. Cf. Peters v. National Railroad Passenger Corporation,* 966 F.2d 1483 (D.C. Cir. 1992) (Mailed notice to apparent

residence address, lacking apartment number, was "reasonably calculated" to give notice; "Not reasonably forseeable" that address was incomplete without an apartment number.)[5]

Further, the lack of "reasonable effort" is proven by the evidence, *undisputed by Prudential*, that a changed, corrected address was given by Petitioners to Prudential, approximately one year prior to the class notice period. App. Jackson 84. A lack of effort further is proven by the Affidavit of Prudential employee Nittolo, in which Prudential *admitted*, in the District Court, that *it used, and knew, contemporaneously during the class notice period, that Petitioners maintained a correct address, different from the Prudential Dallas office address used for mailing* the notice of pendency and opt-out rights. App. Jackson 81-83, 88-89.

There is *no evidence* in the proceedings as to Petitioners of any use of "reasonable effort", by Lead Class Counsel nor by Prudential, to identify Petitioners' accurate address for the mailing of notice of pendency and of opt-out rights. The evidence used or referred-to during Petitioners' proceedings is merely the following: (A.) Prudential's furnishing un-specified data from its in-house "DIG" department, with no indication whether any cross-reference to then-current, class notice period, account-

---

[5] Neither Prudential nor Lead Class Counsel has alleged, below, that the purported notice mailing by Prudential employee Nittolo (App. Jackson 88-89) was a mailing by Prudential as "nominee owner", *cf.* App. Jackson 8. The lack of a specific mailing date or address in the Nittolo affidavit, when measured against the careful "Broker's Notice" procedure used by the Claims Administrator and settling parties, *cf.* App. Toland 31-33, puts to rest any notion of use of "street names".

holder monthly statement addresses was made (App. Jackson 86); and (B.) The use by Garden City Group, Claims Administrator, of non-specific name, address and transaction data related to the earlier class period, *not* to the class notice period, together with two computer tapes including some name and address changes, all provided by Prudential.

As to this second type of data in (B.), above, there was no specification as to effort made by Lead Class Counsel, nor Prudential, to obtain or verify addresses, with no information as to whether current addresses during the class notice period were consulted, and with no specification as to who obtained address change data, from what source, nor when, nor in what manner. App. Toland 28, 31.

The purported mailing of a copy of the class notice of pendency, by Prudential employee Nittolo to Petitioners, contradicted the notice provisions of the District Court's Order certifying the class, which thus *cannot* be shown to have provided due process to Petitioners. The District Court's Order directed *Lead Class Counsel* to cause the notice to be mailed, *by a specific date*. App. Jackson 7. Mr. Nittolo was not serving as Lead Class Counsel, but instead was a Prudential employee; In addition, his affidavit recites no specific date on which the purported mailing of the notice of pendency and of opt-out rights was accomplished. App. Jackson 88-89.

Petitioners gave written notice to Prudential, as to Petitioners' changed address, approximately one year prior to the class mailing deadline of September 19, 1995. App. Jackson 7, 84. Petitioners' litigation or other complaints against Prudential, which were settled in the

underlying class action, were a valuable chose in action; Depriving Petitioners of their ability to advance their claims individually was a denial of a valuable property right of Petitioners. *Mullane, supra,* 309 U.S. at 313. In other cases of forfeiture of property or personal rights, the individual notice requirements of *Mullane* and *Eisen* are observed by requiring notice be mailed to *the address supplied by the intended recipient,* as, for example, in *Grievance Committee for the Southern District of New York v. Polur,* 67 F.3d 3, 6 (2nd Cir. 1995) (Per curiam), *cert. den.,* ___ U.S. ___, 116 S.Ct. 1692 (1996):

> "When an attorney has furnished his address to the court clerk . . . the mailing of a court document *to the address furnished by the attorney is reasonably calculated to apprise the attorney of that document.* Such a mailing constitutes notice sufficient to meet the requirements of due process." (emphasis added)

In addition, when a government entity seeking to make a forfeiture has information, indicating that the person whose rights are to be forfeited does *not* reside at the address used, notice to that address is insufficient to provide due process, under either the Fifth or Fourteenth Amendments to the Constitution. By this standard, and given that Prudential's records were *conceded* to contain Petitioners' notice of address change, the purported notice of pendency and opt-out rights sent to the incorrect address failed to give Petitioners due process. *Covey v. Somers,* 351 U.S. 141 (1956); *Robinson v. Hanrahan,* 409 U.S. 38 (1972) (Per curiam); *U.S. v. Giraldo,* 45 F.3d 509 (1st Cir. 1995); *Torres v. $36,256.80 U.S. Currency,* 25 F.3d 1154 (2nd Cir. 1994); *Burns v. City of Dallas,* No. CA-3-94-CV-2770-R, 1997 WL 118424 (N.D. Tex. March 12, 1997); *Montgomery v. Scott,* 802 F. Supp. 930 (W.D.N.Y. 1992);

Seals v. Nicholl, 378 F. Supp. 172 (N.D. Ill. 1973); *Gutt v. United States*, 641 F. Supp. 603 (W.D. Va. 1986).

II.

THE PROCEEDINGS BELOW INCORRECTLY JUDGED THE ADEQUACY OF NOTICE OF CLASS PENDENCY AND OPT-OUT RIGHTS, AS TO PETITIONERS, BY THE MORE LENIENT STANDARDS OF CLASS SETTLEMENT NOTICE

The Circuit Court of Appeals did not reach due process considerations as to Petitioners. That court's analysis was made solely by reference to an "abuse of discretion" standard. The Court of Appeals failed to make its own *de novo* review of Petitioners' Fed. R. Civ. P. 60(b)(4) Motion. By such an appellate process, the Court of Appeals engaged in error, as discussed in Point III, *infra*.

The Court of Appeals affirmed the District Court's Orders in all respects. App. Toland 3, 23. By its complete affirmance, and by its own failure to address Petitioners' due process concerns, the Court of Appeals thus endorsed the District Court's application of erroneous standards of due process.

The District Court erred by evaluating the lack of individual notice to Petitioners, as to *class pendency* and *class opt-out rights*, by the District Court's application of the more lenient standards applicable to class notice of *settlement* pursuant to Rule 23(e). The District Court properly should have applied Fed. R. Civ. P. 23(c)(2), but did not.

In contrast to the Civil Rule 23(c)(2) requirement of giving the *"best notice practicable . . . including individual*

notice to all members who can be identified with reasonable effort . . . " (emphasis added), as to pendency and the right to opt-out of a Rule 23(b)(3) action, notice of class settlement is governed by the more lenient standard in Rule 23(e), of notice given in the manner directed by the Court:

> "**(e) Dismissal or Compromise.** A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner *as the court directs.*" (emphasis added)

The cases applied by the District Court, incorrectly applying Rule 23(e) principles of class settlement, are cited in the District Court's Supplemental Order at App. Jackson 53-55, 57-58. Emblematic of the District Court's incorrect application of a flawed notice standard, as to Rule 23(c)(2) notice of pendency and of opt-out rights, is the District Court's broad assertion and conclusion, in the context of pendency and opt-out, that:

> "The Court is granted the power to direct the means of providing notice, subject only to these broad "reasonableness" standards imposed by due process. *Grunin v. International House of Pancakes*, 513 F.2d 114, 121 (8th Cir.) [sic] *cert. denied*, 423 U.S. 864 (1975)." App. Jackson 54.

Those cases relied upon below in this proceeding, applying the incorrect, more-lenient standards of settlement pursuant to Rule 23(e), include *Grunin v. International House of Pancakes, supra.* App. Jackson 54, 57, 58 at note 6. In the portion of the *Grunin* opinion cited by the District Court quoted immediately above, the *Grunin* court stated:

> "The initial claim . . . is that the notice sent . . . regarding the *second proposed settlement* was so inadequate . . .
>
> . . . .
>
> " . . . However, *Rule 23(e)* provides that notice be given 'in such manner as the court directs.' Thus, the mechanics of the notice process are left to the discretion of the court subject only to the broad 'reasonableness' standards imposed by due process. (Citation omitted)" 513 F.2d at 120-'21. (Emphasis added)

Other cases of notice of class settlement, relied on incorrectly below as to notice to Petitioners of class pendency and opt-out rights, include that portion of the opinion in *Trist v. First Federal Savings & Loan Association of Chester,* 89 F.R.D. 1 (E.D. Pa. 1980), dealing with *Trist*'s "first category" and "second category" of class members, both of whom *previously had been sent notice of class pendency and potential opt-out,* but notice *of later class settlement* either was returned un-delivered ("First Category") or was never sent ("Second Category"; This "Second Category" who were, in fact, previously sent notice of pendency was the group of 37, upon whose treatment in *Trist* the District Court erroneously relied and cited. App. Jackson 54.)

The decision in *Trist* as to these first two "categories" was specifically based upon settlement rules under Fed. R. Civ. P. 23(e):

> "The first category . . . consists of 3,161 class members for whom the notices of proposed settlement . . . were returned undelivered by the Postal Service . . . Defendants ask that these

> 3,161 class members be excluded . . . *even though they were given initial notice under section (c)(3)* . . .
>
> . . . .
>
> "The second category . . . did not receive notice of the proposed settlement. These thirty-seven class members . . . since *all class members in this category received initial notice under section (c)(2)* . . . " 89 F.R.D., at 2-3. (emphasis added)

The District Court's reliance on such portions of *Trist*, applying the same so as to excuse the lack of notice to Petitioners of class pendency and opt-out rights, is the application of an erroneous standard to Petitioners. App. Jackson 54, 57-58.

The District Court also applied to Petitioners the same, incorrect standard of discretionary notice of class settlement, by the District Court's application of *In re VMS Limited Partnership Securities Litigation*, No. 90-C-2412, 1995 WL 355722 at *2 (N.D. Ill. June 12, 1995). App. Jackson 53-54, 58. The cited *VMS* decision was incorrectly-decided, because of its reliance upon that portion of *Trist, supra*, in which Rule 23(e) *settlement* notice discretionary principles were discussed (*Trist's* "Second category" of 37 persons, who *had been sent notice of class pendency*). 1995 WL 355722, at *2.

Applying those Rule 23(e) principles from *Trist*, to a case of non-receipt of notice of class pendency, as did the *VMS* opinion, constituted error in that opinion. Reliance thereon by the District Court in these proceedings constituted application to Petitioners of an incorrect standard of class notice.

In addition, the District Court used incorrect standards of due process, and excused the lack of notice to Petitioners, by ignoring the principal thrust of a case of notice sent to an *address supplied by the intended recipient* expressly for that purpose, *Weigner v. City of New York*, 852 F.2d 646 (2nd Cir. 1988), *cert. den.* 488 U.S. 1005 (1989). (Use of address, supplied by intended recipient, on "in rem" card as to tax foreclosure statute). App. Jackson 53. Other inapposite cases relied upon by the District Court were "street name" cases, *not* involving, for example, any issue as to notice of class pendency being mailed to any incorrect address of the intended recipient, a stockbroker; and a case of generalized, broad-brush challenge to class notice procedures, not involving any complaint of use of a known-incorrect address, nor of *non*-use of a known *proper* mailing address. Respectively, such inapposite cases relied upon by the District Court are the "street name" case, *Silber v. Mabon*, 18 F.3d 1449, at 1453-'54 (9th Cir. 1994); and the case of generalized notice objections, *Weinberger v. Kendrick*, 698 F.2d 61 (2nd Cir. 1982), *cert. den. sub nom. Coyne v. Weinberger*, 464 U.S. 818 (1983) (hereinafter, "*Weinberger*"). App. Jackson 53-54.[6]

---

[6] *Weinberger* is especially inapposite to Petitioners' due process concerns. *Weinberger* approved the generalized mailing to a list, compiled from unspecified records of brokerage houses and of the debtor-in-bankruptcy. The Second Circuit in *Weinberger* noted that " . . . no alternative method of ascertaining class members' identities has been suggested to us . . . (citation omitted)." 698 F.2d at 71.

In the instant case, the class Claims Administrator apparently used un-specified records derived from Prudential's in-house "DIG" group. App. Toland 28; App. Jackson 86. *No indication* has developed thus far, in Petitioners' proceedings,

III.

THE CIRCUIT COURT OF APPEALS ERRED BY NOT MAKING *DE NOVO* REVIEW, AND INCORRECTLY APPLIED AN "ABUSE OF DISCRETION" STANDARD, IN REVIEW OF PETITIONERS' FED. R. CIV. P. 60(b)(4) MOTION MADE ON VOIDNESS AND DUE PROCESS GROUNDS

Petitioners' Motion in the District Court, for relief from the underlying class Final Judgment, was expressly-made by Petitioners pursuant to Fed. R. Civ. P. 60(b)(4), grounds which that Rule states as " . . . the judgment is void." App. Jackson 70. Petitioners' Motion positively alleged the voidness of the Final Judgment, based upon the denial of due process to Petitioners, the grounds which have been asserted consistently by Petitioners since that initial Motion. App. Jackson 68. While Petitioners also pled for alternate relief, in an extension of time to make the opt-out election pursuant to Fed. R. Civ. P. 6, nevertheless Rule 60(b)(4) voidness of the Final Judgment, on due process grounds, was expressly-advanced by Petitioners as their basis for Rule 60 relief.

---

that Prudential nor Lead Class Counsel ever referred to *current Prudential account records*, used for Prudential's routine mailings. Those were the records, and address, which Petitioner sought to correct by Petitioner's written notice to Prudential, approximately one year prior to the class notice period. App. Jackson 84.

Cf. Breslow v. Prudential-Bache Properties, Inc., No. 91-C-1230, 1994 WL 478611 (N.D. Ill. Sept. 1, 1994), at *3: "According to Prudential . . . the Class Notice was sent to the Posnicks within this time frame, in late 1991, to the *exact same address as these account statements.*" (emphasis added)

Rule 60(b)(4) voidness on due process grounds was, likewise, asserted by Petitioners as their basis for relief from the Judgment, in their Motion for the District Court's Reconsideration, after the District Court's denial of Petitioners' initial Motion. App. Jackson 91, 93-94.

Reviewing this Rule 60(b)(4) Motion premised on a lack of due process, the Circuit Court of Appeals committed error in at least two ways: First, that court erroneously applied an "abuse of discretion" standard; Second, that court failed to make its own *de novo* review of Petitioners' Rule 60(b)(4) Motion.[7]

The Court of Appeals applied an "abuse of discretion" standard in review of the District Court's actions on Petitioners' Motions. App. Toland 6, 10-11. The Second Circuit analysis was made solely on the basis of "late optou " from the underlying class. The Circuit Court applied a test of the moving class members' "excusable neglect" and a consideration of whether Prudential might suffer

---

[7] In describing Petitioners' Motions to the District Court, the Circuit Court also erroneously recited that Petitioners had argued for "extraordinary relief" in their Motions. App. Toland 11. Petitioners never made such argument.

"Extraordinary circumstances" are required for relief pursuant to *subsection (b)(6)* of Civil Rule 60. *Ackermann v. U.S.*, 340 U.S. 193 (1950); *Klapprott v. U.S.*, 335 U.S. 601 (1949); *Martella v. Marine Cooks & Stewards Union*, 448 F.2d 729 (9th Cir. 1971), *cert. den.* 405 U.S. 974 (1972). " . . . (I)t does not assist sound analysis to repeat those phrases in cases brought pursuant to the other portions of Rule 60(b) . . . " 11 C. Wright, A. Miller and M. Kane, *Federal Practice and Procedure*, § 2857, at note 14 (1995) (hereinafter, *"Wright, Miller and Kane"*).

"substantial prejudice", accompanied by the Second Circuit's citation of *Supermarkets General Corp. v. Grinnell Corp.*, 490 F.2d 1183, 1186 (2nd Cir. 1974), *aff'd sub nom. Manhattan-Ward, Inc. v. Grinnell Corp.*, 490 F.2d 1183 (2nd Cir. 1974) ("*Supermarkets General*"). App. Toland 6. As to Petitioners, the Second Circuit definitively concluded "There has been no abuse of discretion". App. Toland 11. Indeed, the Second Circuit did not reach any due process grounds in its Summary Order as to Petitioners. App. Toland 10-11. Due process analysis was non-existent, throughout the Court of Appeals' Summary Order. App. Toland 3-23.

The Second Circuit's application of an "abuse of discretion" test to the District Court's actions and consideration of Prudential's "substantial prejudice"[8] by grant of the relief, may have application pursuant to Fed. R. Civ. P. 6 relief for extension of the opt-out time limit, based upon "excusable neglect". Such analysis also might apply to potential relief under Rule 60(b)(1), which is premised upon "mistake, inadvertence, surprise, or excusable neglect". The cited portion of *Supermarkets General* reveals that the opinion rested squarely upon those other Civil Rules, 6(b)(2) and 60(b)(1). 490 F.2d at 1186. However,

---

[8] The Second Circuit failed to mention that any purported "prejudice" caused to Prudential, as to Petitioners, was caused by Prudential itself; *i.e.*, by Prudential's failure to locate or use, for Petitioners, either the *accurate* mailing address, *given Prudential one year earlier* (App. Jackson 84), or else the mail address used by Prudential, apparently on a monthly or quarterly basis for other, routine purposes. Neither was used for this class action purpose of mailing Petitioners notice of class pendency and notice of class opt-out rights.

neither of those two Rules are directed to the voidness of the judgment, as is Fed. R. Civ. P. 60(b)(4).

A Motion such as Petitioners', for relief from a void judgment pursuant to Rule 60(b)(4):

> " . . . differs markedly from motions under the other clauses of Rule 60(b). There is no question of discretion on the part of the court when a motion is under Rule 60(b)(4). (footnote omitted)" 11 *Wright, Miller and Kane,* § 2862.

For example, some situations have been termed so "extreme" that the result (reversal of the judgment) is "foreordained"; In that event, denial of such relief would, itself, be an abuse. 11 *Wright, Miller and Kane,* § 2857, at note 3, citing *Pittston Co. v. Reeves,* 263 F.2d 328 (7th Cir. 1959) (*Pittston* involved the dismissal of a class action, without notice to class members which was described as "mandatory" under Fed. R. Civ. P. 23(c); Addressing a Rule 60(b) Motion to vacate premised upon the lack of notice to class members, the opinion stated the court had "no discretion", and that to hold otherwise would be to " . . . *convert a mandatory requirement into a discretionary one* . . . ", 263 F.2d at 329) (emphasis added); *Simer v. Rios,* 661 F.2d 655, 663-664 (7th Cir. 1981), *cert. den.* 456 U.S. 917 (1982) (Under Fed. R. Civ. P. 23(e), lack of notice to absent class members held to require voiding the Order approving the class settlement, by application of Civil Rule 60(b)(4)).

A void judgment has been described as being a "legal nullity"; Accordingly, a court has no discretion in considering a motion for relief from the judgment. *Sagers v. Yellow Freight Systems, Inc.,* 68 F.R.D. 686 (N.D. Ga. 1975),

aff'd 529 F.2d 721 (5th Cir. 1976) (Class consent decree held void under Civil Rule 60(b)(4), because of lack of settlement notice under Fed. R. Civ. P. 23e); *Jordon v. Gilligan*, 500 F.2d 701, at 704, 710 (6th Cir. 1974), *cert. den.* 421 U.S. 991 (1975) (Fed. R. Civ. P. 60(b)(4) applied to vacate attorney fee award in class action). *Chambers v. Armontrout*, 16 F.3d 257, at 260 (8th Cir. 1994); *Orner v. Shalala*, 30 F.3d 1307, 1310 (10th Cir. 1994).

A judgment is void for purposes of Fed. R. Civ. P. 60(b)(4) if the court entering it acted in a manner inconsistent with due process. *New York Life Insurance Company v. Brown*, 84 F.3d 137 (5th Cir. 1996) (Vacating District Court judgment, on Civil Rule 60(b)(4) Motion; Default judgment below void, because notice of default hearing sent, by court clerk, to address which clerk should have known was not correct address, as shown by other address in clerk's records). *In re Four Seasons Securities Law Litigation*, 502 F.2d 834, 842 (10th Cir. 1974), *cert. den.* 419 U.S. 1034 (1974); *Textile Banking Company, Inc. v. Rentschler*, 657 F.2d 844, at 850 (7th Cir. 1981); *Chambers v. Armontrout, supra*; *Bass v. Hoagland*, 172 F.2d 205, 209 (5th Cir. 1949), *cert. den.* 338 U.S. 816 (1949); *In re Center Wholesale, Inc.*, 759 F.2d 1440 (9th Cir. 1985) (1-day notice of hearing on cash collateral order in bankruptcy; Held, due process violated, citing *Mullane, supra*; Order held void.)

The Second Circuit also erred by failing to make its own *de novo* review of Petitioners' Rule 60(b)(4) Motion, since Petitioners based their Motion on the voidness of the class Final Judgment. Because voidness is a question of law, *de novo* review by the Appeals Court is required. *Export Group v. Reef Industries*, 54 F.3d 1466, 1469 (9th Cir.

1995). Accord, *FDIC v. Aaronian*, 93 F.3d 636, 639 (9th Cir. 1996) (*De novo* review of District Court decision on vacating judgment as void for lack of personal jurisdiction); Cf. *VTA Inc. v. Airco*, 597 F.2d 220, 224 at note 7 (10th Cir. 1979) (Appellate court can "readily" reverse a lower court which erred as a matter of law).

For the reasons stated above in this Petition, reversal of the Circuit Court of Appeals Summary Order, and a holding of the voidness of the underlying class Final Judgment of the District Court, as to Petitioners, is required.

Accordingly, Petitioners respectfully request this Court to grant a Writ of Certiorari.

Respectfully submitted,

JEROME HOWARD FERGUSON
Counsel of Record for Petitioners
FERGUSON & COMPANY, P.C.
300 Embassy Court
624 North Good-Latimer
Expressway
Dallas, Texas 75204-5850
Telephone 214/824-5555
Fax 214/823-3888

DOUGLAS D. DARNOLD
FERGUSON & COMPANY, P.C.
Dallas, Texas
Of Counsel

APPENDIX

Page

INCORPORATION BY REFERENCE .....App. 1

PRELIMINARY ORDER IN CONNECTION WITH SETTLEMENT PROCEEDINGS, OF THE U.S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK (AUG. 29, 1995) .....App. 2

OPINION OF THE U.S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK (DIRECTING NOTICE TO BE PROVIDED TO ABSENT CLASS MEMBERS) (AUG. 30, 1995) .....App. 14

ORDER NO. 44 OF THE U.S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK (DENYING JACKSONS' MOTION FOR RELIEF FROM ORDER AND FINAL JUDGMENT) (JAN. 19, 1996) .....App. 38

ORDER AMENDING ORDER NO. 44, OF THE U.S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK (MODIFYING PRIOR ORDER AS TO THE JACKSONS' MOTION FOR RELIEF FROM ORDER AND FINAL JUDGMENT) (FEB. 8, 1996) .....App. 40

OPINION OF THE U.S. DISTRICT COURT OF THE SOUTHERN DISTRICT OF NEW YORK (SUPPLEMENT TO ORDERS AS TO INDIVIDUAL OPT-OUT REQUESTS) (FEB. 2, 1996) ...App. 42

THE JACKSONS' MOTION AND BRIEF FOR EXCLUSION FROM CLASS AND FOR RELIEF FROM ORDER AND FROM FINAL JUDGMENT (DEC. 21, 1995) .....App. 64

AFFIDAVIT OF MCDANIEL JACKSON (DEC. 21, 1995).....App. 77

PROOF OF CLAIM AND RELEASE FORMS, ACCOUNT NUMBERS 0DS809363, 025878957 AND 025878965 .....App. 81

LETTER FROM MCDANIEL JACKSON TO LISA LITTLE (JAN. 3, 1995).....App. 84

AFFIDAVIT OF MATHIAS E. MONE (IN OPPOSITION TO JACKSON MOTION) (JAN. 12, 1996).....App. 85

AFFIDAVIT OF JOSEPH J. NITTOLO (IN OPPOSITION TO JACKSON MOTION) (JAN. 12, 1996).....App. 88

THE JACKSONS' MOTION AND BRIEF FOR RECONSIDERATION OF ORDER (JAN. 26, 1996).....App. 90

LETTER TO JEROME H. FERGUSON, III FROM DONALD R. LITTLEFIELD (DEC. 7, 1995) ...App. 99

INCORPORATION BY REFERENCE:

McDaniel Jackson and Miriam Jackson, Petitioners in this instant Petition for Writ of Certiorari, by this reference incorporate, within this Appendix, the contents of the Appendix, page numbers App. i through App. 67, of a Petition for Writ of Certiorari under this Court's Docket No. 96-1538, JOHN D. TOLAND AND CHRISTAL TOLAND v. IN RE: PRUDENTIAL SECURITIES INCORPORATED LIMITED PARTNERSHIP LITIGATION, MDL DOCKET NO. 1005 (the "Toland Petition"), which Toland Petition was filed with this Court on or about March 27, 1997.

By this instant Petition, Petitioners McDaniel Jackson and Miriam Jackson in part seek review of the same "Summary Order" of the United States Court of Appeals for the Second Circuit, which Summary Order appears at pages App. 1 through App. 23 of the Toland Petition.

In addition to the documents incorporated by reference above, Petitioners McDaniel Jackson and Miriam Jackson present the documents appearing hereinafter, as contents of this Appendix.[1]

---

[1] Within the Jacksons' instant Petition, page references to documents within the Appendix of the Toland Petition are indicated as "App. Toland", followed by page number citation; Page references, within the Jacksons' instant Petition, to the documents appearing hereinafter in this Appendix are indicated as "App. Jackson", together with page number citation.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re: PRUDENTIAL SECURITIES INCORPORATED LIMITED PARTNERSHIPS LITIGATION	MDL Docket No. 1005 M-21-67 (MP) (Filed Aug. 29, 1995)

PRELIMINARY ORDER IN CONNECTION WITH SETTLEMENT PROCEEDINGS

WHEREAS, on August 9, 1995, certain parties in the above-entitled litigations entered into a Stipulation and Agreement of Partial Compromise and Settlement (the "PSI Settlement Agreement") which is subject to review under Rule 23 of the Federal Rules of Civil Procedure ("F.R.Civ.P.") and which, together with the exhibits thereto, sets forth the terms and conditions for the proposed settlement with the PSI Settling Defendants of the claims alleged in the Consolidated Complaint on the merits and with prejudice upon the terms and conditions set forth in the PSI Settlement Agreement; and the Court having read and considered the PSI Settlement Agreement and the accompanying documents; and the parties to the PSI Settlement Agreement having consented to the entry of this Order; and all capitalized terms used herein having the meanings defined in the PSI Settlement Agreement;

NOW, THEREFORE, IT IS HEREBY ORDERED, this 29th day of August, 1995, that:

1. Pursuant to F.R.Civ.P. 23(b) (3), this action is hereby certified, solely for purposes of the PSI Settlement and as against the PSI Settling Defendants only, as a class action on behalf of all persons or entities, acting in their own capacity or in a representative capacity, who do not request exclusion from the Class in accordance with the procedures provided herein, and who either:

(a) purchased Units in any of the partnerships or other entities listed on Schedule 1 to the PSI Settlement Agreement, between January 1, 1980 and June 8, 1994 (the "Settlement Class Period"), on their initial offerings or in the secondary market, or

(b) purchased from or through PSI, on their initial offerings or in the secondary market, Units in any of the partnerships or other entities listed on Schedule 2 to the PSI Settlement Agreement, during the Settlement Class Period.

Excluded from the Class are:

(a) All persons or entities (i) whose claims against any of the PSI Settling Defendants with respect to the Partnerships invested in by that person or entity have been finally adjudicated, individually or on a class-wide basis, in litigation or arbitration, before any court or arbitration tribunal; or (ii) who have entered into valid releases releasing PSI with respect to the claims asserted in the Consolidated Complaint, including persons or entities who have executed submission agreements and agreed to expedited dispute arbitration proceedings in the SEC Proceeding. To the extent that any person or entity has not had all of his, her or its claims with

respect to investments in all of the Partnerships finally adjudicated or finally released as against any of the PSI Settling Defendants, the Class includes said person or entity, but only to the extent of such unadjudicated and/or unreleased claims;

(b) the defendants, members of the immediate family (i.e. spouses and children) of any individual defendant, and the legal representatives, heirs, successors or assigns of any defendant, and the past or present subsidiaries, parents, affiliates, successors and predecessors of any of the defendants that are corporations, partnerships or other legal entities;

(c) all Partnerships and any persons or entities that are or were general partners of any of the Partnerships; and

(d) any person who has been determined in any civil or criminal or administrative proceeding, by any court or regulatory authority, including governmental, quasi governmental or self-regulatory organization, to have violated any law, rule or regulation, or committed any wrongdoing, in connection with or relating to the marketing, purchase, sale or holding of Units or other interests in, or relating to the operation, oversight, monitoring or management of any of the Partnerships.

2. The Court finds the prerequisites to a class action under Fed. R. Civ. P. 23(a) have been satisfied for settlement purposes in that:

(a) between January 1, 1980, and June 8, 1994 (the "Settlement Class Period"), over 700 different Partnerships were sold to over 300,000

investors, and the number of Class Members is estimated to be approximately 100,000;

(b) the losses to the Class Representatives are alleged to have been caused by the same events and course of conduct that give rise to the claims of the other members of the Class;

(c) among the questions of law and fact.common to the Class are: (i) whether Defendants violated 18 U.S.C. §§ 1962 (a), (c) and (d) and, (ii) whether Defendants concealed from the Class the practices that are the subject of the Consolidated Complaint; and

(d) The Class Representatives will fairly and adequately protect the interests of the Class and have retained experienced counsel qualified in class action litigation.

3. The Court finds the Consolidated Actions are maintainable as a class action under F. R. Civ. P. 23(b)(3) for settlement purposes because (i) a class action is superior to other available methods for the fair and efficient adjudication of this controversy and (ii) questions of law and fact common to the members of the class predominate over any questions affecting only individual members.

4. Pursuant to F.R.Civ.P. 23, plaintiffs Sandra Abrahamson, Ellen Bottner, Richard S. Day, Irene Day, Paula Dumbroff, Hinda Farmer, James David Farmer, Guy Freeborn, Edmond Goulder, Betsy Baker Gorman, Leroy Greenspan, Benjamin Ileto, Franco Iozzi, Michael Massad, Robert Olsen, Elenore Olsen, Patrick Page, Joseph E. Tinaglia and June C. Tinaglia are certified as Class Representatives.

5. Pursuant to F.R.Civ.P. 23, the members of the Executive Committee of Plaintiffs' Counsel, as designated in Pre-Trial Order No. 2 in this action, are appointed as lead counsel of record for plaintiffs and the Class ("Lead Class Counsel") and Melvyn I. Weiss and Lawrence A. Sucharow are appointed Class Counsel Co-Chairmen.

6. A hearing (the "Settlement Fairness Hearing") pursuant to F.R.Civ.P. 23(e) is hereby scheduled to be held before the Court on November 17, 1995, at 10:30 a.m. for the following purposes:

(a) to finally determine whether this action satisfies the applicable prerequisites for class action treatment under F.R.Civ.P. 23(a) and (b);

(b) to determine whether the proposed Settlement is fair, reasonable, adequate and in the best interests of the Class and should be approved by the Court;

(c) to determine whether the Order and Final Judgment as provided under the Settlement Agreement should be entered, dismissing as against the PSI Settling Defendants the Consolidated Complaint filed herein, on the merits and with prejudice, and barring the Non-Settling Defendants from asserting or pursuing claims for either contribution or for PSI Acts Indemnification against the PSI Settling Defendants, and to determine whether the release by the Class to the Released Parties, as set forth in the PSI Settlement Agreement, should be provided to the Released Parties;

(d) to determine whether the Plan of Allocation should be finally approved as fair, reasonable, adequate and in the best interests of the Class;

(e) to consider plaintiffs' counsel's application for an award of Attorneys' Fees and Expenses; and

(f) to rule upon such other matters as the Court may deem appropriate.

7. The Court reserves the right to approve the Settlement and/or the Plan of Allocation with or without modification and with or without further notice of any kind. The Court further reserves the right to enter its Order and Final Judgment approving the PSI Settlement Agreement and dismissing the Consolidated Complaint as against the PSI Settling Defendants on the merits and with prejudice regardless of whether it has approved the Plan of Allocation and/or awarded attorneys' fees and expenses.

8. The Court approves the form, substance and requirements of the Notice of Pendency of Class Action, Proposed Partial Settlement of Class Action, Settlement Fairness Hearing, Right to Appear and Right to Request Exclusion from Partial Settlement of Class Action (the "Class Notice"), and the Proof of Claim form annexed hereto as Exhibits 1 and 2 respectively.

9. Lead Class Counsel shall cause the Class Notice and the Proof of Claim, substantially in the form annexed hereto, to be mailed, by first class mail, postage prepaid, on or before September 19, 1995, to all Class Members who can be identified with reasonable effort by Lead Class Counsel. The PSI Settling Defendants shall cooperate in making their books, records and information available to Lead Class Counsel or their agent for the purpose of identifying and giving notice to the Class. Lead Class Counsel shall use reasonable efforts to give notice to

nominee owners such as brokerage firms and other persons or entities who held or now hold limited partnership interests or other interests in the Partnerships as record owners but not as beneficial owners. Such nominee owners are directed to forward copies of the Class Notice and Proof of Claim to their beneficial owners or to provide Lead Class Counsel with lists of the names and addresses of the beneficial owners, and Lead Class Counsel are ordered to send the Class Notice and Proof of Claim promptly to such beneficial owners. Additional copies of the Class Notice shall be made available to any record holder requesting such for the purpose of distribution to beneficial owners, and such record holders shall be reimbursed from the Settlement Pool, upon receipt by Lead Class Counsel of proper documentation, for the reasonable expense of sending the Class Notices and Proof of Claim to beneficial owners. Lead Class Counsel shall, at or before the Settlement Fairness Hearing, file with the Court proof of mailing of the Class Notice and Proof of Claim.

10. The Court approves the form of Summary Notice Of Pendency Of Class Action And Proposed Partial Settlement (the "Published Notice") in substantially the form and content annexed hereto as Exhibit 3 and directs that Lead Class Counsel shall cause the Published Notice to be published in the national edition of *The Wall Street Journal, The New York Times* and *U.S.A. Today* twice within ten days of the mailing of the Class Notice. Lead Class Counsel shall, at or before the Settlement Fairness Hearing, file with the Court proof of publication of the Published Notice.

11. The form and method set forth herein of notifying the Class of the Settlement and its terms and conditions meet the requirements of F.R.Civ.P. 23 and due process, constitute the best notice practicable under the circumstances, and shall constitute due and sufficient notice to all persons and entities entitled thereto.

12. In order to be entitled to participate in the Net Settlement Pool, in the event the Settlement is effected in accordance with all of the terms and conditions thereof, each Class Member shall take the following actions and be subject to the following conditions:

(a) A properly executed Proof of Claim, including Release, Covenant Not To Sue, and Acknowledgment (the "Proof of Claim"), substantially in the form attached hereto as Exhibit 2, must be filed with the Claims Administrator, at the Post Office box indicated in the Class Notice, not later than December 15, 1995. Lead Class Counsel are authorized to extend this deadline for filing of Proofs of Claim from time to time for up to an aggregate of 90 days, by filing a notice with the Clerk's office of such extension and serving a copy of such notice upon counsel for the PSI Settling Defendants. Such deadline may be further extended by Court Order. Each Proof of Claim shall be deemed to have been filed when postmarked (if properly addressed and mailed by first class mail, postage prepaid) provided such Proof of Claim is actually received prior to the order of the Court approving distribution of the Net Settlement Pool. Any Proof of Claim submitted in any other manner shall be deemed to have been filed when it was actually received at the address designated in the Class Notice.

(b) The Proof of Claim filed by each Class Member must satisfy the following conditions: (i) it must be properly filled out, signed and filed in a timely manner in accordance with the provisions of the preceding subparagraph; (ii) it must be accompanied by adequate supporting documentation for the transactions reported therein, in the form of broker confirmation slips, broker account statements, an authorized statement from the broker containing the transactional information found in a broker confirmation slip, or such other documentation as is deemed adequate by Lead Class Counsel; (iii) if the person executing the Proof of Claim is acting in a representative capacity, a certification of his current authority to act on behalf of the Class Member must be included in the Proof of Claim; and (iv) the Proof of Claim must be complete and contain no material deletions or modifications of any of the printed matter contained therein and must be signed under penalty of perjury.

(c) As part of the Proof of Claim, each Class Member shall submit to the jurisdiction of the Court with respect to the claim submitted, and shall (subject to effectuation of the Settlement) release all claims as provided in the PSI Settlement Agreement.

13. Any putative Class Member who wishes to be excluded from the Class may request exclusion by submitting a written notice requesting exclusion from the Class and showing the Class Member's name, address and Social Security or Taxpayer Identification Number and the date, Partnership, amount and brokerage firm involved in the putative Class Member's purchases of Partnership Units in the Class Period. To be effective, the

written request for exclusion must be signed by the beneficial owner of the Units, or his, her or its legal representative, and must be mailed, postage prepaid, to Prudential Securities Incorporated Limited Partnerships Litigation, P.O. Box 9388, Garden City, New York 11530-9388 so as to be received no later than October 30, 1995.

14. Class Members requesting exclusion from the Class shall not be entitled to receive any payment out of the Net Settlement Pool as described in the PSI Settlement Agreement and Class Notice.

15. The Court will consider comments and/or objections to the Settlement, the Plan of Allocation, or the award of attorneys' fees and reimbursement of expenses only if such comments or objections and any supporting papers are filed in writing with the Clerk of the Court and copies of all such papers are received by the following: Melvyn I. Weiss, Esq., Milberg Weiss Bershad Hynes & Lerach, One Pennsylvania Plaza, New York, New York 10119, Lawrence A. Sucharow, Esq., Goodkind Labaton Rudoff & Sucharow LLP, 100 Park Avenue, New York, New York 10017, and Leonard A. Spivak, Esq., Cahill Gordon & Reindel, 80 Pine Street, New York, New York 10005, on or before October 30, 1995. Attendance at the hearing is not necessary; however, persons wishing to be heard orally in opposition to the approval of the Settlement are required to indicate in their written objection their intention to appear at the hearing. Persons who intend to object to the Settlement, the Plan of Allocation and/or counsel's application for an award of attorneys fees and expenses and desire to present evidence at the Settlement Fairness Hearing must include in their written

objections the identity of witnesses they may call to testify and exhibits they intend to introduce into evidence at the Settlement Fairness Hearing. Class Members do not need to appear at the hearing or take any other action to indicate their approval.

16. All applications for awards of attorneys' fees and reimbursement of expenses, with supporting documentation, must be filed on or before November 8, 1995.

17. Pending final determination of whether the Settlement should be approved, the Plaintiffs, all Class Members, and each of them, and anyone who acts or purports to act on their behalf, shall not institute, commence or prosecute any action, either directly, individually, derivatively, representatively, or in any other capacity, which asserts Settled Claims against any Released Party.

18. If: (a) the Settlement is terminated by PSI pursuant to paragraph 39 of the PSI Settlement Agreement; (b) any specified condition to the Settlement set forth in the PSI Settlement Agreement is not satisfied and the satisfaction of such condition is not waived in writing by Lead Class Counsel and Counsel for the PSI Settling Defendants; (c) the Court rejects, in any respect, the Order and Final Judgment in substantially the form and content annexed to the PSI Settlement Agreement as Exhibit B and/or Lead Class Counsel and Counsel for the PSI Settling Defendants fail to consent to the entry of another form of order in lieu thereof; (d) the Court rejects the PSI Settlement Agreement, including any amendment thereto approved by Lead Class Counsel and Counsel for the PSI Settling Defendants; or (e) the Court approves the

PSI Settlement Agreement, including any amendment thereto approved by Lead Class Counsel and Counsel for the PSI Settling Defendants, but such approval is reversed on appeal and such reversal becomes final by lapse of time or otherwise, then, in any such event, the PSI Settlement Agreement, including any amendment(s) thereof, and this Preliminary Order certifying the Class and the Class Representatives for purposes of the Settlement shall be null and void, of no further force or effect, and without prejudice to any party, and may not be introduced as evidence or referred to in any actions or proceedings by any person or entity, and each party shall be restored to his, her or its respective position as it existed prior to the execution of the PSI Settlement Agreement.

19. The Court retains exclusive jurisdiction over these actions to consider all further matters arising out of or connected with the Settlement and insofar as they continue to be asserted against the Non-Settling Defendants.

Dated: New York, New York
August 29, 1995

/s/ Milton Pollack
SENIOR UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re: PRUDENTIAL SECURITIES INCORPORATED LIMITED PARTNERSHIPS LITIGATION	MDL Docket No. 1005 M-21-67 (MP) ORDER NO. 30

OPINION

(Filed Aug. 30, 1995)

Appearances:

Class Counsel Co-Chairmen

Melvyn I. Weiss
George A. Bauer, III
Sharon Mirksy
MILBERG WEISS BERSHAD HYNES & LERACH
One Pennsylvania Plaza
New York, NY 10119

Lawrence A. Sucharow
Joel H. Bernstein
Joseph Sternberg
Diane Zilka
GOODKIND LABATON RUDOFF & SUCHAROW LLP
100 Park Avenue
New York, NY 10017-5563

Members of Plaintiffs' Executive Committee

BONNETT, FAIRBOURN, FRIEDMAN & BALINT, P.C.
H. Sullivan Bunch
4041 North Central, Suite 1100
Phoenix, AZ 85012

FINKELSTEIN, THOMPSON & LOUGRAN
Burton H. Finkelstein
William Butterfield
2828 Pennsylvania Ave., N.W.
Washington, D.C. 20007

CHIMICLES JACOBSEN & TIKELLIS
Nicholas Chimicles
Denise Davis Schwartzman
One Haverford Center
361 West Lancaster Avenue
P.O. Box 100
Haverford, PA 19041-0100

DUKER & BARRETT
William Duker
Kenneth Alberstadt
1585 Broadway
New York, NY 10036

KRISLOV AND ASSOCIATES
Clinton Krislov
222 North LaSalle Street
Suite 810
Chicago, IL 60601

Attorneys for the Prudential Defendants

Thomas J. Kavaler
Mathias E. Mone
CAHILL GORDON & REINDEL
80 Pine Street
New York, New York 10005

MILTON POLLACK, Senior District Judge:

Plaintiffs, pursuant to Rule 23 of the Federal Rules of Civil Procedure, have moved for: certification of a settlement class; preliminary approval of the proposed class action settlement with certain defendants; and approval of the form and manner of notice to be provided to Class Members.

PRELIMINARY

After several years of vigorous litigation in this multidistrict action and its constituent cases (as well as related state court actions), and months of intense negotiations, plaintiffs have reached a settlement with the PSI Settling Defendants.[1] If finally approved by the Court, the settlement will resolve a large portion of the litigation arising

---

[1] The PSI Settling Defendants are: Prudential Securities Incorporated ("PSI"); Prudential Insurance Company of America, Prudential Securities Group, Inc., Prudential-Bache

out of Prudential Securities Incorporated's ("PSI") marketing and sale of high-risk limited partnership interests to the investing public. The Stipulation and Agreement of Partial Compromise and Settlement ("Stipulation"), dated August 9, 1995, provides recovery of $110,000,000 for a Class of investors who have not previously resolved their claims against the PSI Settling Defendants. The settlement amount, less costs and attorneys' fees approved by the Court, will be distributed to Class Members in accordance with a Plan of Allocation.

The $110 million settlement represents an outstanding achievement for the benefit of the Class. For the reasons addressed below, the Court will: (1) certify the settlement class consented to by the interested parties; (2) grant preliminary approval of the settlement; (3) schedule a fairness hearing; (4) approve of the form and content of notice to be provided to absent Class Members; and (5) direct that such notice be provided to absent Class Members in the manner set forth in the proposed order.

Capital Funding, Inc., Prudential-Bache Agriculture Inc., Prudential-Bache Energy Production, Inc., Prudential-Bache Leasing, Inc., Prudential-Bache Minerals, Inc., Prudential Realty Partners, Inc., R. & D. Funding Corp., Graham Resources, Inc., Graham Energy, Ltd., Graham Securities Corp., Graham Royalty, Ltd., Prudential-Bache Properties, Inc., George Ball, Robert Sherman, James Darr, William E. Pittman, Jr., James M. Kelso, Brian J. Martin, Frank W. Giordano, Joseph H. Quinn, Joe W. DeFur, Paul J. Proscia, Anthony J. Hertl, Frank Saraceno and John J. Graham.

BACKGROUND

The allegations of the plaintiffs set forth the alleged misconduct of PSI and its representatives on which these suits were based, as mentioned hereafter in this background statement.

On April 14, 1994, the Judicial Panel on Multidistrict Litigation entered an order transferring to this Court several class action cases, arising out of PSI's questioned marketing and sale of limited partnership units during the 1980s. On May 19, 1994, this Court entered Order No. 1 (subsequently superseded by Order No. 2 entered June 27, 1994), which consolidated the constituent actions and authorized plaintiffs to serve a consolidated complaint. On June 8, 1994, plaintiffs served their detailed, three volume, Consolidated Complaint, which asserted claims under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.*, among other claims.

As alleged in the Consolidated Complaint, approximately 700 limited partnerships were organized, marketed and sold as part of a massive and continuous plan designed to induce investments. PSI persuaded investors into buying partnership units by describing them as "risk-free" investments. For many years, PSI represented that their investment principal remained safe and secure when, in fact, it was allegedly eroded seriously by fees and charges and distributions characterized as "income". As charged by plaintiffs, the standardized sales approach used by PSI allegedly misrepresented the nature of the highly speculative partnerships and the considerable risks associated with investing in them. The reported performance of partnerships was allegedly designed to make

illiquid and uneconomical partnerships appear profitable, so as to induce continuous investment in related partnerships and to cover up initial alleged misstatements.

While investors incurred substantial losses from the moment they purchased these partnerships, the plan produced tremendous amounts of commissions, management fees and profits for the PSI Settling Defendants as well as the non-settling parties, such as sponsors and general partners of the limited partnerships, which carried the misrepresentations forward.

Following the commencement of a number [sic] federal and state actions by plaintiffs here and other investors, the Securities and Exchange Commission ("SEC") also filed a complaint against PSI on October 21, 1993. The SEC complaint was accompanied by a final order effectuating a settlement between the SEC (and most state securities regulators) and PSI providing for, among other things, an unlimited compensation fund (the "SEC Fund") for investors (who chose to participate) relative to the same partnerships at issue in this case. On October 27, 1994, the United States Attorney for the Southern District of New York announced that PSI had acknowledged criminal wrongdoing in connection with the sale of units in one of the groups of limited partnerships involved in this action, the Prudential-Bache Energy Income Limited Partnerships ("Energy Income").[2]

---

[2] While Energy Income is among the partnerships at issue in this case, very few Energy Income investors remain in the

The settlement primarily would benefit those Class Members who, for various reasons, did not participate in the SEC Fund, "opted out" of previous class actions or did not otherwise bring an individual legal proceeding. It follows an intensive and multifaceted investigation by plaintiffs' counsel, which included: analysis of enormous quantities of documents produced by the defendants; interviews and the procurement of affidavits from former employees of several defendants; and significant depositions of personnel of one of the largest sponsor-defendants, the Polaris Organization. In addition, plaintiffs' counsel had access to relevant discovery, including important deposition and trial testimony, obtained in several related actions and arbitrations against the PSI Settling Defendants and some of the sponsoring defendants. On August 9, 1995, after intensive negotiations facilitated by the Court, plaintiffs and the PSI Settling Defendants entered into the Stipulation to Settle the PSI Settling Defendants' portion of this case for $110,000,000.

THE SETTLEMENT

The Stipulation provides that, subject to this Court's approval pursuant to Rule 23(e), the PSI Settling Defendants will pay $110,000,000 for the benefit of Class

---

class as a consequence of: (a) the resolution of *In re Prudential-Bache Energy Income Sec. Lit.*, MDL 888 in 1993; (b) numerous individual actions and arbitration proceedings brought by Energy Income investors, and (c) resolution of claims by Energy Income investors in the SEC Fund.

Members.[3] The claims of all Class Members (who do not otherwise exclude themselves from the Class) relating to the marketing, sale and ownership of units in the partnerships, as well as the management or operation of the partnerships, would be released and dismissed on the merits and with prejudice as against the PSI Settling Defendants and Released Parties.[4] This litigation will continue against the Non-Settling Defendants[5] and the PSI Settling Defendants have agreed with plaintiffs to cooperate in continuing discovery in this action as it relates to those defendants. For purposes of effectuating this settlement, the PSI Settling Defendants have consented to certification of a Class pursuant to Rule 23(b)(3) for settlement purposes.

The parties have also submitted to the Court a Plan of Allocation for purposes of equitably distributing the settlement proceeds to Class Members. In general, the Plan of Allocation assigns a weight to the recognized loss for a partnership and utilizes several factors to arrive at a mathematical representation of the relative strengths and weaknesses of the claims of Class Members who invested in that partnership, as compared with other partnerships. The factors to be considered include: (1) whether PSI or an affiliate was a general partner of the partnership; (2) whether PSI was the principal marketer of the partnership; (3) whether the partnership was initially sold

---

[3] One million dollars has been paid into the Notice Fund and the $109,000,000 balance will be paid on or about September 9, 1995 into CRIS.

[4] *See* Stipulation ¶20.

[5] *See* Stipulation ¶9.

through a public or private offering; and (4) the years during which the partnership was sold. It is anticipated that the entire net settlement fund would be distributed among approved claimants.

DISCUSSION

The proposed settlement has been reached on behalf of a class defined as all persons or entities, acting in their own capacity or in a representative capacity, who either:

> (a) purchased units in any partnerships or other entities listed on Schedule 1 [to the Stipulation] between January 1, 1980 and June 8, 1994 (the "Settlement Class Period"), on their initial offerings or in the secondary market, or
>
> (b) purchased from or through PSI on their initial offerings or in the secondary market, Units in any of the partnerships or other entities listed on Schedule 2 [to the Stipulation] during the Settlement Class Period.

The Class definition excludes persons or entities whose claims have been released, the partnerships, defendants and the individual defendants' immediate families. Also excluded are individuals who have signed submission agreements in the SEC Fund, which agreements provide that the SEC Fund and its expedited arbitration procedures will be the sole forum for resolution of these individuals' claims.

The settlement class device has been recognized throughout the country as the best, most practical way to effectuate settlements involving large numbers of claims

by relatively small claimants. In fact, "tenative or temporary settlement classes are favored when there is little or no likelihood of abuse, and the settlement is fair and reasonable and under the scrutiny of the trial judge." *In re Beef Indust. Antitrust Lit.*, 607 F.2d 167, 174 (5th Cir. 1979), *cert. denied*, 452 U.S. 905 (1981). In *Weinberger v. Kendrick*, 698 F.2d 61 (2d Cir. 1982), *cert. denied*, 464 U.S. 818 (1983), the Second Circuit observed that

> [t]he hallmark of Rule 23 is flexibility. . . . Temporary settlement classes have proved to be quite useful in resolving major class action disputes. While their use may still be controversial, most Courts have recognized their utility and have authorized the parties to compromise their differences, including class action issues through this means.

698 F.2d at 72-73. *See also Malchman v. Davis*, 706 F.2d 426, 433-34 (2d Cir. 1983); *In re Baldwin-United Corp. Sec. Lit.*, 105 F.R.D. 475, 478-481 (S.D.N.Y. 1984).

In *In re Drexel Burnham Lambert Group, Inc.*, 130 B.R. 910 (S.D.N.Y. 1991), this Court "certified temporarily, and for settlement purposes only, a mandatory non-opt-out class of all securities litigation claimants . . . and two mandatory non-opt-out subclasses". 130 B.R. at 912. The Court subsequently certified the classes in conjunction with approval of the settlement, analyzing the pertinent requirements of Rule 23. 130 B.R. at 918-924. The Second Circuit later affirmed the Court's certification of a mandatory class and the approval of the settlement at issue.

See In Re Drexel Burnham Lambert Group, Inc., 960 F.2d 285, 290-292 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 1070 (1993).[6]

In this case, a settlement class is appropriate because there is no likelihood of abuse, and the settlement is fair, reasonable and has been arrived at pursuant to informed arm's-length negotiations under the supervision of the Court. After several cases arising out of PSI's marketing and sale of limited partnerships were transferred to this Court by the Judicial Panel on Multidistrict Litigation, the Court entered Order No. 1 on May 19, 1994 (superseded by Order No. 2 on June 27, 1994), which designated an Executive Committee of plaintiffs' counsel. The Court itself supervised the litigation between the parties, was intimately familiar with the complex legal issues facing plaintiffs and defendants and participated in settlement discussions between the parties.

In addition, a settlement class in complex litigation (such as this case), actually enhances absent class members' opt-out rights because the right to exclusion is provided simultaneously with the opportunity to accept or reject the terms of a proposed settlement. Unlike a class notice in a case that will be litigated (and which class members must decide to opt out or remain in the class without any indication as to the case's prospects), the description of the Plan of Allocation in the Notice will

---

[6] The Third Circuit's recent conclusion that the district court must "assure that settlement classes meet *all* of the requirements of 23(a) and (b)", *In re General Motors Corporation Pick-Up Truck Fuel Tank Products Liability Lit.*, 55 F.3d 768, 797 n.19 (3d Cir. 1995) (emphasis in original) merely reflects the practice already employed by this Court.

allow Class Members to have some idea of what he or she sacrifices by opting out. *See Baldwin,* 105 F.R.D. at 481 (absent class members "will have a more concrete basis for deciding whether to opt out of a plaintiffs' class").

In any event, each requirement for a Rule 23(b)(3) class is satisfied and certification of a class – be it for settlement or otherwise – is appropriate.

A. Standards For Class Certification.

The Second Circuit has directed district courts to apply Rule 23 according to a liberal rather than a restrictive interpretation, *see Korn v. Franchard Corp.,* 456 F.2d 1206, 1208-09 (2d Cir. 1972); *Green v. Wolf Corp.,* 406 F.2d 291, 298, 301 (2d Cir. 1968), *cert. denied,* 395 U.S. 977 (1969), and has explicitly noted its preference for class certification in securities cases and the importance of certification for small securities holders located throughout the country.[7] *See Escott v. Barchris Constr. Corp.,* 340 F.2d 731, 733 (2d Cir.), *cert. denied sub nom. Drexel & Co. v. Hall,* 382 U.S. 816 (1965); *Maywalt v. Parker & Parsley Petroleum Co.,* 147 F.R.D. 51, 54 (S.D.N.Y. 1993). Class actions are also a desirable method for assertion of RICO claims based on predicate acts of securities fraud that might otherwise be time-barred from direct assertion. *See*

---

[7] In this case it has been estimated that 350,000 investors purchased approximately $8 billion in limited partnership units. This averages approximately $23,000 per investor. Out of pocket losses, computed by deducting distributions, tax benefits and current residual values would, for many Class Members, would [sic] be much lower.

Hoxworth v. Blinder Robinson & Co., 980 F.2d 912, 925 (3d Cir. 1992).

The presentation on this motion by the plaintiffs, which they say will be further enhanced in connection with final consideration of the proposed settlement, amply shows that class certification is appropriate. *See Maywalt v. Parker & Parsley Petroleum Co.*, 147 F.R.D. at 54.

B. Rule 23(a)(1) is Satisfied Because The Class is So Numerous That Joinder of All Members is Impracticable.

Rule 23(a)(1) requires that the class be so numerous that joinder of all class members is impracticable. *See Maywalt v. Parker & Parsley Petroleum Co.*, 147 F.R.D. 51, 54 (S.D.N.Y. 1993). In this case, the Class consists of approximately 100,000 geographically dispersed members, rendering joinder impracticable. At the fairness hearing, the Court will be advised of the precise number of Class Members to whom notice was provided. Rule 23(a)(1) is plainly satisfied.

C. There Are Predominant Questions Of Law Or Fact Common To Each Class Member.

Rule 23(a)(2) requires the existence of questions of law or fact common to the class.[8] Rule 23(b)(3) requires

---

[8] Rule 23(a)(2) is generally considered a " 'low hurdle' easily surmounted." *Scholes v. Stone, McGuire & Benjamin*, 143 F.R.D. 181, 185 (N.D. Ill. 1992).

that common questions predominate over individual questions. Both provisions are satisfied here.

Commonality under Rule 23(a)(2) and Rule 23(b)(3) is established if all class members are in a substantially similar factual situation and the questions of law raised by plaintiffs are applicable to each class member. "Courts generally focus on the liability issue in deciding whether the predominance requirement is met, and if the liability issue is common to the class, common questions are held to predominate over individual questions." *Dura-Bilt Corp. v. Chase Manhattan Corp.*, 89 F.R.D. 87, 93 (S.D.N.Y. 1981). *See also Trief v. Dun & Bradstreet Corp.*, 144 F.R.D. 193, 199 (S.D.N.Y. 1992); *In re Baldwin-United Corp. Sec. Lit.*, 122 F.R.D. 424, 426 (S.D.N.Y. 1986).

The Consolidated Complaint evidences that common questions predominate. The partnerships were organized as part of a common course of misconduct marketed and sold to plaintiffs and the Class through standardized sales materials, which were generated allegedly at the management level and passed on to the PSI sales force. PSI, through its standardized sales approach, allegedly misrepresented the nature of the highly speculative partnerships and the risks associated with investing. PSI incorrectly described the investment objectives as: (1) the preservation of principal; (2) the generation of substantial above-market income; and (3) the return of capital with appreciation after a defined period of time (generally five to seven years). The reported performance of prior similar partnerships was made to make these illiquid and uneconomical partnerships appear profitable. This enabled the notion of "successful" performance of its earlier partnerships to appear as indicia of the safety and

security of all of the partnerships. The actual performance of the partnerships in which they had invested did not measure up to the appearances. In monthly account statements, PSI reported the investments as retaining their initial investment value. The actual value, *if any*, was far less.

While plaintiffs and most Class Members had direct dealings with PSI sales personnel, the substance of those transactions was governed by PSI's course of conduct, adopted at the management level of PSI. That course of conduct and the content of the sales materials did not disclose the investors' losses and aided the misconduct alleged. In *In re Baldwin-United Corp. Sec. Lit.*, 122 F.R.D. 424 (S.D.N.Y. 1986), Judge Brieant addressed commonality based on similar allegations:

> The gravamen of plaintiffs' complaints is that the defendants, in connection with their business of analyzing investment opportunities and providing financial services to clients, *each engaged in a similar unified course of conduct to promote and sell Baldwin-United's SPDAs to the public without disclosing that the issuer was experiencing financial and regulatory difficulties.* Plaintiffs contend that the defendants, *at the corporate, policy making level,* knew or recklessly disregarded evidence of Baldwin-United's precarious financial condition and that *they elected to implement or maintain standardized marketing practices that concealed the true investment risks of the SPDAs.* Those practices, plaintiffs allege, emphasized the safety, liquidity and promising investment aspects of the SPDAs even though information available to the defendants foretold Baldwin-United's collapse.

122 F.R.D. at 426 (emphasis added).

In this case, because the central and predominant focus of this litigation is PSI's improper course of conduct in organizing and operating uneconomical limited partnerships and marketing and selling investments in those partnerships – conduct that has attracted the attention of the SEC, securities regulators from all fifty states and the United States Attorney – the relevant questions in this case are susceptible to class-wide proof. Each Class member is similarly situated with respect to the underlying orchestrations by PSI, and "it would be folly to force each [investor] to prove the nucleus of the alleged fraud again and again." *In re American Continental Corp./Lincoln Saving & Loan Sec. Lit.*, 140 F.R.D. 425, 431 (D. Ariz. 1992).[9] The predominance requirement of Rule 23(b)(3) is satisfied.

---

[9] In *Baldwin*, Judge Brieant rejected defendants' contention that oral representations by broker-dealers made class treatment inappropriate, stating that "the wrongful conduct alleged by plaintiffs occurred at the management level, if it did, and manifested itself in the defendants' course of promoting and selling the SPDAs. As a result, the relevant questions are readily susceptible to class-wide proof." 122 F.R.D. at 427. *See also In re American Continental Corp./Lincoln Saving & Loan Sec. Lit.*, 140 F.R.D. 425, 430 (D. Ariz. 1992) ("The center of gravity of the fraud transcends the specific details of oral communications."). It is well settled that oral representations will not preclude certification of a class that is otherwise appropriate. *See Shankroff v. Advest, Inc.*, 112 F.R.D. 190, 193 (S.D.N.Y. 1986) ("Since plaintiff's allegations focus on overall managerial decisions which affected all Advest clients, questions of oral representations or individual reliance do not overwhelm the issues common to the class."); *In re Energy Sys. Equip. Leasing Sec. Lit.*, 642 F. Supp. 718, 750 (E.D.N.Y. 1986); *In re Resource Exploration Sec. Lit.*, 1984 WL 3240 (S.D.N.Y. Oct. 15, 1984).

D. Rule 23(a)(3) is Satisfied as Plaintiffs' claims are Typical of Claims of the Class.

Rule 23(a)(3) requires that the claims asserted by the plaintiffs be typical of those claims of each member of the class. Plaintiffs' claims are typical if they arise from the same event or practice or course of conduct that gives rise to the claims of other class members and his or her claims are based on the same legal theory. *See In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 291 (2d Cir. 1992); *Trief v. Dun & Bradstreet Corp.*, 144 F.R.D. 193, 200 (S.D.N.Y. 1992); *Hoxworth v. Blinder Robinson & Co.*, 980 F.2d 912, 923 (3d Cir. 1992). The typicality requirement of Rule 23(a)(3) is liberally construed; and "typical" does not mean "identical." *Trief*, 144 F.R.D. at 200. The possibility of factual distinctions between the claims of the named plaintiffs and those of other class members does not destroy typicality, as similarity of legal theory may control even in the face of differences of fact. *In re Bally Mfg. Sec. Lit.*, 141 F.R.D. 262, 268 (N.D. Ill. 1992), *aff'd on other grounds*, 2 F.3d 1456 (7th Cir. 1993).

Here, plaintiffs are in the same position as absent Class Members, regardless of the specific PSI-sponsored partnership in which they invested, because of the uniform course of improper conduct and standardized sales approach applied by defendants. The typicality requirement of Rule 23(a)(3) does not require that named plaintiffs invest in all related partnerships that are the subject of the action. *See Maywalt v. Parker & Parsley Petroleum Co.*, 147 F.R.D. 51, 56-57 (S.D.N.Y. 1993) (class certified even though representative plaintiffs invested in only three of five limited partnerships at issue); *Longden v.*

Sunderman, 123 F.R.D. 547 (N.D. Tex. 1988) (class certified on behalf of investors in 121 limited partnerships although the six representatives invested in on [sic] seven of them). *See also Hoxworth v. Blinder Robinson & Co.*, 980 F.2d 912 (3d Cir. 1992); *Tedesco v. Mishkin*, 689 F. Supp. 1327, 1335-36 (S.D.N.Y. 1988); *Handwerger v. Ginsberg*, 19 Fed. R. Serv. 2d (Callaghan) 1051 (S.D.N.Y. 1975), *app. denied*, 519 F.2d 1339 (2d Cir. 1975); *Eisenberg v. Gagnon*, 766 F.2d 770 (3d Cir. 1985), *cert. denied*, 474 U.S. 946 (1985).

"As long as plaintiffs assert, as they do here, that defendants committed the same wrongful acts in the same manner against all members of the class, they establish necessary typicality." *In re Amerifirst Sec. Lit.*, 139 F.R.D. 423, 429 (S.D. Fla. 1991). The allegations in the Consolidated Complaint, which are accepted as true for purposes of class certification, establish that plaintiffs' claims, including their reliance on the securities' marketability and the integrity of the regulatory process, are typical of the claims of all Class Members in satisfaction of Rule 23(a)(3). *See ACC/Lincoln*, 140 F.R.D. at 433-434.

E. Plaintiffs Would Fairly and Adequately Protect the Interests of the Class.

The "adequacy of representation" requirement of Rule 23(a)(4) is comprised of two factors: (1) the representative party's attorney must be qualified, experienced and generally able to conduct the litigation; and (2) the plaintiff's interests must not be antagonistic to those of the remainder of the Class. *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 291 (2d Cir. 1992); *Trief v. Dun &*

Brandstreet Corp., 144 F.R.D. 193, 201 (S.D.N.Y. 1992). Both elements are present in this case.

Counsel for plaintiffs have successfully conducted numerous class actions, including class actions under the federal securities laws and RICO, in this Court and in federal district courts throughout the United States. *See, e.g., In re Drexel Burnham Lambert Group, Inc.*, 130 B.R. 910, 920 (S.D.N.Y. 1991). In litigating this case, with the massive number of documents involved, plaintiffs' counsel have expended a large quantity of their own funds on one of the most innovative and sophisticated "high-tech" document management/litigation support systems available. Further, during the conduct of the litigation in this case, the Court has observed first-hand the calibre of plaintiffs' counsel and is able to judge their adequacy in representing the Class. Finally, plaintiffs' interests are aligned with the interests of other Class Members. Plaintiffs and their counsel are, therefore, adequate representatives of the Class in satisfaction of Rule 23(a)(4).

F. A Class Action Is Superior To Other Available Methods of Adjudication.

Finally, consideration of judicial economy and sheer access to justice underscores the superiority of the class action in this case. Classes have been certified where potential management problems were far more complex. *See, e.g., In re Domestic Air Transportation Antitrust Lit.*, 137 F.R.D. 677, 694 (N.D. Ga. 1991) (certified class consisting of all domestic airline passengers since January 1, 1988 on several major carriers, *i.e.* at least 12.5 million people).

Accordingly, for the reasons addressed above, the Court will grant the request to send notice of the proposed settlement to absent Class Members. At the fairness hearing, plaintiffs aver that they will present additional evidence, if necessary, to establish the propriety of class certification.

THE PROPOSED SETTLEMENT MERITS PRELIMINARY APPROVAL.

It is well established that there is an overriding public interest in settling and quieting litigation, and this is particularly true in class actions. *In re Michael Milken & Assoc. Sec. Lit.*, 150 F.R.D. 46, 53 (S.D.N.Y. 1993); *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992), *cert. denied*, 113 S.Ct. 408 (1992); *Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977). The settlement is now before the Court for purposes of preliminary approval of the settlement as possibly fair, reasonable and adequate. The Court's function now is "to ascertain whether there is any reason to notify the class members of the proposed settlement and to proceed with a fairness hearing." *Armstrong v. Board of School Directors of the City of Milwaukee*, 616 F.2d 305, 314 (7th Cir. 1980) (citation omitted).

> If the preliminary evaluation of the proposed settlement does not disclose grounds to doubt its fairness or other obvious deficiencies, such as unduly preferential treatment of class representatives or of segments of the class, or excessive compensation for attorneys, and appears to fall within the range of possible approval, the court should direct that notice under Rule 23(e) be given to the class members of a formal fairness hearing, at which arguments and evidence may

> be presented in support of and in opposition to the settlement.

Manual for Complex Litigation, Third § 30.41 at 237 (1995). *See In re Baldwin-United Corp. Sec. Lit.*, 105 F.R.D. 475, 482 (S.D.N.Y. 1984) ("Upon consideration of the proposed settlement presented to this Court for preliminary approval, the Court finds that it is at least sufficiently fair, reasonable and adequate to justify notice to those affected and an opportunity to be heard."); *Armstrong*, 616 F.2d at 314 (The purpose of the pre-notification hearing is "to determine whether the proposed settlement is 'within the range of possible approval.' ").[10]

Approval of the settlement, following a fairness hearing, is a matter for the exercise of the trial court's discretion, which when exercised is done in recognition of the policy encouraging settlement of disputed claims. *In re Michael Milken & Assoc. Sec. Lit.*, 150 F.R.D. at 53. *See In re Warner Communications Sec. Lit.*, 798 F.2d 35, 37 (2d Cir. 1986) ("It is not the district judge's job to dictate the terms of a class settlement."). Most of the relevant factors to be considered are: "(1) the complexity, expense and likely duration of the litigation . . . ; (2) the reaction of the class to the settlement . . . ; (3) the stage of the proceedings and the amount of discovery completed . . . ; (4) the risks of establishing liability . . . ; (5) the risks of establishing damages . . . ; (6) the risks of maintaining the class through the trial . . . ; (7) the ability of the defendants to

---

[10] *See also In re Mid-Atlantic Toyota Antitrust Lit.*, 564 F. Supp. 1379, 1383-85 (D. Md. 1983); *In re First Commodity Corporation of Boston Customer Account Lit.*, 119 F.R.D. 301, 313-14 (D. Mass. 1987).

withstand a greater judgment . . . ; (8) the range of reasonableness of the settlement fund in light of the best possible recovery . . . ; (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation. . . . " *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974); *In re Michael Milken & Assoc. Sec. Lit.*, 150 F.R.D. at 64; *Chatelain v. Prudential-Bache Securities, Inc.*, 805 F. Supp. 209, 213 (S.D.N.Y. 1992).

Here, the settling parties have reached a settlement that appears on the surface as extremely beneficial to the Class. The financial recovery is among the largest securities class action settlements ever achieved. The settlement allows Class Members who were excluded from, or did not participate in, the SEC Fund or the legal proceedings against PSI, to obtain a recovery. Those investors who did participate in the SEC Fund, or whose claims against PSI have otherwise been released or adjudicated, are not included in the Class, thus preserving the settlement fund for those investors who have not otherwise obtained or attempted to obtain a recovery. Most Class Members' claims under the federal securities laws are time-barred, *see Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 111 S. Ct. 2773, 115 L. Ed. 2d 321 (1991), and the risk and expense of pursuing individual claims is often not practicable, especially when more complex theories such as RICO are required.[11]

---

[11] Indeed, probably because of the statute of limitations, the Consolidated Complaint contains no direct claims for violation of the federal securities laws.

Moreover, the risks involved with further litigation are significant, as many cases arising out of the same underlying misconduct have been dismissed or otherwise resolved against investors.[12] Instead of the lengthy, costly, and uncertain course of further litigation, the settlement provides a significant and expeditious route to recovery for the Class. In the circumstances of such a case as this, it may be preferable "to take the bird in the hand instead of the prospective flock in the bush." *Oppenlander v. Standard Oil Co.*, 64 F.R.D. 597, 624 (D. Colo. 1974). The outstanding result offered by the settlement appears to outweigh the various risks associated with continued litigation.

In any event, the Court will be in a position to fully evaluate the *Grinnell* factors at the fairness hearing, where it can consider the submissions by proponents and potential opponents of the settlement and the reaction of the Class Members. At this stage of the proceeding, the Court need only find that the proposed settlement fits "within the range of possible approval," *Armstrong*, 616 F.2d at 314, a test that the settlement here easily satisfies.

THE FORM AND MANNER OF NOTICE TO THE CLASS.

The proposed Notice (included as Exhibit 1 to Exhibit A of the to the [sic] Stipulation) has been drafted by the

---

[12] *See, e.g., Harner v. Prudential-Bache Securities, Inc.*, 1994 WL 494871 (6th Cir. 1994); *Caraluzzi v. Prudential Securities, Inc.*, 824 F. Supp. 1206 (N.D. Ill. 1993); *Weisl v. Polaris Holding Co.*, No. 29239/92 (N.Y. Sup. Ct. June 29, 1993); *Flanagan v. R & D Funding Corp.*, No. 13425/92 (N.Y. Sup. Ct. July 1, 1994).

settling parties to provide Class Members with a fair understanding of the actions, the parties and the nature of the settlement. The Notice also clearly details which investors are eligible to participate in the settlement and the rights and obligations that accompany such participation. *See In re Michael Milken & Assoc. Sec. Lit.*, 150 F.R.D. at 60 (Notice must be reasonably calculated to apprise the class of the pending action and to afford class members an opportunity to object); *O'Brien v. National Property Analysts Partners*, 739 F. Supp. 896, 901 (S.N.D.Y. [sic] 1990) (The notice need only contain a "very general description of the proposed settlement, including a summary of the monetary or other benefits that the class would receive and an estimation of attorneys' fees and other expenses.") (citation omitted).

The settling parties propose sending a copy of the Notice to each Class Member, whose address can be reasonably located, by first-class mail, which is the best notice practicable. *See Zimmer Paper Products, Inc. v. Berger & Montague P.C.*, 758 F.2d 86, 91 (3d Cir. 1985), *cert. denied*, 474 U.S. 902 (1985). In addition, the settling parties propose to give notice by publication of a summary notice on two separate occasions in national editions of *The Wall Street Journal*, *The New York Times* and *U.S.A. Today*. It is believed that such a published summary notice will have the broadest reach to inform those members of the Class who, for some reason, may not receive the mailed Notice.

CONCLUSION

For the reasons stated, the Court will and does: (1) grant temporary class certification; (2) grant preliminary

approval of the settlement; (3) schedule a fairness hearing; (4) approve of the form and content of notice to be provided to absent Class Members; and (5) direct that such notice be provided to absent Class Members.

Dated: New York, New York
August 29, 1995

/s/ Milton Pollack
Milton Pollack
Senior United States
District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re: PRUDENTIAL SECURITIES INCORPORATED LIMITED PARTNERSHIPS LITIGATION	MDL Docket No. 1005 M-21-67 (MP) ORDER No 44 (Filed Jan. 19, 1996)

ORDER

MacDaniel and Miriam Jackson ("the Jacksons") having moved this Court for an Order, pursuant to Rules 6(b) and 60(b) of the Federal Rules of Civil Procedure, granting them: 1) additional time to exclude themselves from the class certified herein; 2) relief from the provisions of this Court's November 20, 1995 Order and Final Judgment so that they may continue to prosecute their arbitration against Prudential Securities Incorporated currently pending before the American Arbitration Association as case number 71-136-00014-95; or, alternatively, 3) an Order excluding them from the said class; it is hereby

ORDERED that the Jacksons are Class Members in this action and accordingly are bound by this Court's November 20, 1995 Order and Final Judgment; and it is further

ORDERED that the Jacksons' motion is denied in its entirety and that the Jacksons shall forthwith dismiss with prejudice all of their claims asserted against Prudential Securities, Inc. in their arbitration pending before the American Arbitration Association as case number

71-136-00014-95 except their claim relating to their purchase of life insurance policies.

Dated: New York, New York
January 19, 1996

/s/ Milton Pollack
MILTON POLLACK
SENIOR UNITED STATES
DISTRICT JUDGE

Thomas J. Kavaler (TK-8517
Mathias E. Mone (MM-5881)
Cahill Gordon & Reindel
80 Pine Street
New York, New York 10005
(212) 701-3000
Attorneys for the PSI Settling Defendants

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PRUDENTIAL SECURITIES INCORPORATED LIMITED PARTNERSHIPS LITIGATION	MDL Docket No. 1005 M-21-67 (MP) Re: Opt-Out Order No. 44-D (Filed Feb. 8, 1996)

ORDER AMENDING ORDER NO. 44

Class Members MacDaniel and Miriam Jackson having moved to amend this Court's Order No. 44, it is hereby

ORDERED that this Court's Order No. 44 is amended to provide that the claims in the Jackson's [sic] arbitration proceeding pending before the American Arbitration Association as Case No. 71 136-00014-95 with respect to alleged loss or destruction of the Jackson's [sic] personal property may proceed to the extent that the Jackson's [sic] can show that said property has value other than as evidence of claims released in this Class Action; provided that the Jacksons' [sic] may not assert in connection with the prosecution of said personal property claims any matters which are encompassed within the Settled Claims

as said term is defined in the PSI Settlement Agreement dated August 9, 1995 approved by this Court's November 20, 1995 Order and Final Judgment; and it is further

ORDERED that the Jacksons' [sic] may not assert any claim in said arbitration proceeding relating to the conduct of this Class Action including a claim based on PSI's alleged failure to provide class counsel with a proper address.

Dated: February 8th, 1996

/s/ Milton Pollack
MILTON POLLACK
Senior United States
District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re: PRUDENTIAL SECURITIES INCORPORATED LIMITED PARTNERSHIPS LITIGATION	MDL Docket No. 1005 M21-67 (MP) SUPPLEMENT TO ORDERS RE OPT-OUTS *See, Footnote 1 Hereof* ORDER NO. 58

OPINION

(Filed Feb. 2, 1996)

Milton Pollack, Senior District Judge

POLLACK, Senior District Judge:

Before the Court are various motions by Class Members for the Court to use its discretionary power under Fed. R. Civ. P. 6(b), 60(b) and 23(d) to allow them additional time to opt-out from the class and/or declare them excluded from the Class.[1]

---

[1] This Opinion supplements Orders entered in this docket Nos. 41, 43, 44, 45, 46, 47, 48, 49, 50, 52, 57 and appropriate entry hereof shall be indicated in regard to said Orders on the docket, as well as the unnumbered Order dated November 29, 1995 endorsed by Memorandum relating to Class Members Matus and Nilson and the unnumbered Order dated December 6, 1995 endorsed by Memorandum relating to the motion of Class Members Greenberg and Zackroff.

Background

On April 14, 1994, the Judicial Panel on Multidistrict Litigation ("JPML") entered an order transferring to this court several class actions which arose out of the alleged fraudulent marketing and sale of limited Partnership interests by Prudential Securities Incorporated ("PSI" or "Prudential").

On May 19, 1994, this Court entered an order which consolidated the Constituent Actions for pre-trial purposes and authorized the plaintiffs to serve a consolidated complaint.

On June 8, 1994 plaintiffs served a detailed multi-volume Consolidated Complaint, which asserted numerous RICO claims, as well as state law claims. The Consolidated Complaint alleged that approximately 700 limited Partnerships were uniformly organized, marketed, sold and operated as part of a massive and continuing scheme to defraud investors. PSI and its co-sponsors allegedly marketed and sold the Partnerships as safe, conservative investments suitable for Individual Retirement Accounts, elderly and retired investors and those investors who sought safety of principal as a primary investment objective despite the known investment risks.

On December 20, 1994, in connection with a Motion to Dismiss Plaintiffs' Consolidated Complaint, PSI submitted an extensive brief which included prospectuses and summaries of prospectuses, purporting to show that all of the risks of investment were disclosed. PSI argued that investors were on inquiry notice from the outset of their investments and that most claims were, therefore,

time-barred. PSI also argued, *inter alia*, that the "bespeaks caution" doctrine required dismissal of the Consolidated Complaint. Among the legal issues raised by the various motions to dismiss and plaintiffs' responses were: statute of limitations, equitable tolling, laches, the "bespeaks caution" doctrine and inquiry notice. These issues created risks on both sides of the litigation.

On October 21, 1993, the SEC had filed a complaint against PSI in the United States District Court for the District of Columbia, and simultaneously PSI consented to the entry of a final order by that court.

The final order in the SEC's proceeding required PSI to pay compensatory damages for all valid claims presented through a court-supervised Claims Resolution Process. PSI consented, among other things, to pay $330 million to establish a fund ("The SEC Fund") for the benefit of defrauded investors and to pay all additional claims in excess of the $330 million in the SEC Fund. The SEC Fund was placed under the general supervision of the United States District Court for the District of Columbia to be administered by its court-approved Claims Administrator.

The Claims Resolution Process had two parts. The first part of the process required eligible investors to submit claims directly to PSI. Pursuant to that process, PSI was obligated either to offer the claimant a monetary settlement or reject the claim. Investors who were not satisfied with PSI's offers of compensation, or whose claims were rejected, had the option to pursue their legal rights in other forums. Alternatively, they could enter the second part of the process: the mandatory arbitration

referred to as "EDAP" (Expedited Dispute Arbitration Procedure). Election to participate in and the results of the mandatory arbitration were to be final and binding on the parties. Investors who were members of previously certified class actions were not permitted to participate in the SEC Fund.

As an essential feature of the SEC Claims Resolution Process, PSI agreed not to assert any statute of limitation defenses with respect to any claims submitted on behalf of eligible investors. This was a significant agreement in that many of the purchases involved went back 10 or more years from the date of the litigation. Even those investors who would be time-barred from bringing a securities action for compensatory damages in another forum were allowed to submit claims within the Claims Resolution Process, including the EDAP. However, investors who wished to avail themselves of the SEC Fund process had to fill out a detailed questionnaire and file it with PSI in the Claims Resolution Process on or before January 10, 1995.

While the SEC Claims Resolution Process provided a valuable and (because statute of limitations defenses were waived, although other defenses were not) virtually riskless means of recovery for many injured limited Partnership investors who had not previously settled with PSI or otherwise had their claims adjudicated, or who had had their claims against PSI previously dismissed solely on statute of limitations grounds, many investors chose not to participate. Some of the reasons suggested were that the personal information requested by PSI in order to determine a claimant's suitability was viewed by some as a burdensome intrusion, and that others may

have found the claim forms and procedure intimidating. Some investors were offered little or nothing in the way of compensation by PSI, which determined, under the Claims Administrator's oversight, that these investors were sophisticated, that the investments were suitable or that the investor was otherwise undeserving of compensation. Some investors, faced with a choice between what they regarded as an unacceptably low offer from PSI and the prospect of possibly hiring counsel and proceeding to EDAP, simply declined to proceed. Other investors either failed to learn of the SEC Claims Resolution Process, or missed the deadline. Those limited partnership investors whose claims remained unresolved were included in the Settlement Class in MDL 1005 and were eligible participants in the Settlement with which we are involved herein if their claims were still extant after the SEC Claims Resolution Process (and any other settlements) had not terminated their claims. The Settlement in this case represented the only last ditch available remedy for claims which would not have any value but for the threat perceived by PSI to have resulted from plaintiffs' counsel's exceptional efforts to reach the Settlement herein.

On August 9, 1995, after several failed starts, the parties hereto finally negotiated remaining details and executed a Stipulation of Settlement which was the culmination of the negotiation process begun long before.

The Stipulation entered into on August 9, 1995, provided that the PSI Settling Defendants will pay $110 million into a Settlement Fund for the benefit of the Class. The Stipulation provided that the claims of all Class Members relating in any way to the marketing, purchase, sale, or holding of units, or other interests in, or to the

operation, oversight, monitoring or management of any of the Partnerships, would be released and dismissed on the merits and with prejudice as against the PSI Settling Defendants and other Released Parties. The litigation was to continue against the Non-Settling Defendants. The Settlement benefited those Class Members who had not previously released the PSI Settling Defendants as a result of their participation in the SEC Claims Fund Procedure, including EDAP, and who had not previously had their claims against the PSI Settling Defendants settled or adjudicated in litigation or arbitration or as a result of prior class actions affecting investors in the particular Partnerships in which they held Units and from which they did not opt-out. Like the SEC proceeding, it once again gave investors who might have been statutorily barred from bringing an action for compensatory damages the opportunity to obtain a recovery against the Settling Defendants.

A significant and fundamental agreement made as pat of the Settlement Agreement in the negotiations was a so-called "blow" provision. The concept of a blow provision was that while the Settling Defendants were perfectly willing to make a global disposition to reach finality, if they could not reach finality with opt-outs who had excluded themselves from the Settlement except for a stipulated agreed dollar resolution of claims, the Settling Defendants were not interested in going forward because they were still facing the expense and the burden of multi-faceted cases all around the country. It was stipulated as part of the proposed Settlement that if $10 million in claims excluded themselves by opting-out from the Settlement proposed, Prudential had the right to walk

away from the $110 million Settlement. This would mean that the 340,000 potential Class Members would get zero from Prudential by way of this Settlement. That was a right Prudential bargained for and insists must be implemented on these motions seeking relief from the opt-out terms. In effect, the Settling Defendants were willing to pay a prospective $120 million; $110 million was paid in cash on the Settlement proposed in Court and the Settling Defendants recognized they might have to pay as much as $10 million more to cover open claims to be subsequently litigated with the opted out claimants. PSI has asserted that it does not think that the opt-outs will ultimately present $10 million of valid claims; PSI believes that it will win those cases, but it recognizes the other possibility. PSI was given the opportunity to look at the blow provision list. PSI had to look at the opt-out list which identified the various claims that had opted out; it had to go through those claims one by one and make its analysis of how much each claim was worth, and assess what, in PSI's view, was the likelihood that the claim would be successful. In other words, if it determined that more than $10 million was realistically represented by claims that had opted out, the blow provision would entitle the withdrawal of the $110 million proposed settlement. PSI faced and made a business decision. After scrutiny of all claims of all those who had timely excluded themselves from the Settlement, PSI decided to remain bound to it. Consequently, it was of significant importance to Prudential to know – as of the effective date of the blow provision – exactly what it was facing and whether to go forward with the $110 million Settlement which was extremely beneficial to the Class.

The so-called blow provision provided in the Settlement was as follows: PSI, at its sole discretion, had the right to terminate the Settlement if requests for exclusion were validly filed by Class Members whose losses, with respect to investments in Partnerships offered and sold after 1986, exceeded $10 million, including interest. If PSI elected to terminate the Settlement pursuant to this paragraph, the Court and Lead Class counsel were to be notified no more than seven (7) calendar days after the deadline set in the Preliminary Approval Order for the receipt of requests for exclusion. If at 5:00 p.m. on the day prior to the Settlement Fairness Hearing (after efforts by Lead Class Counsel to minimize the number of opt-outs), the aggregate of such Out-of-pocket Losses did not exceed $10 million, then the election by PSI to terminate under this paragraph was to become null and void.

The impact of now extending the date to opt-out, would be to radically change the value to PSI of the Settlement. That would significantly prejudice PSI.

On August 29, 1995 this Court certified for settlement purposes a proposed class, defined as all persons or entities, acting in their own capacity or in a representative capacity, who either:

> (a) purchased units in any Partnership or other entities listed on Schedule 1 [to the Stipulation] between January 1, 1980 and June 8, 1994 (the "Settlement Class Period"), on their initial offering or in the secondary market, or (b) purchased from or through PSI on their initial offerings or in the secondary market, Units in any of the Partnerships or other entities listed on Schedule

> 2 [to the Stipulation] during the Settlement Class Period.

163 F.R.D. 200, 207. The proposed Class definition excluded persons or entities whose claims had been released, the Partnerships, defendants and the individual defendants' immediate families. Also excluded were individuals who had effectively agreed to participate in and be bound by EDAP by complying with the procedures of the SEC Claims Administrator in the SEC Fund, which provided that the SEC Fund and its expedited arbitration procedures would be the sole forum for resolution of those individuals' claims.

At this same hearing, the Court approved of the form and content of notice to be provided to absent Class Members, and directed that such notice be provided to absent Class Members in the manner set forth in the proposed Order. The proposed Notice was drafted by the settling parties to provide Class Members with a fair understanding of the actions, the parties and the nature of the Settlement and was approved by the Court (after revisions suggested by the Court) prior to its mailing and publication. It contained the following provisions:

> If you are a Class Member, you have a choice as to whether or not to remain a member of the Class . . . (a) If you do nothing you automatically remain a Member of the Class . . . You will not be able to commence or continue any other litigation, arbitration or other claims against any PSI Settling Defendant in any other forum with respect to the settled claims . . . (b) If you want to exclude yourself from the Class and not be included as a Class Member, the Court will exclude you . . . only if you submit a written

> request for exclusion. To be effective, the written request for exclusion must be signed . . . [sic] must be mailed . . . so as to be received no later than October 30, 1995 . . . If you wish to be eligible to receive your share of the net settlement pool, do not file a request for exclusion.
>
> If you request exclusion, you will not be entitled to receive any payment from the Partial Settlement proceeds . . . If you have not yet filed such a law suit or arbitration and are considering exclusion, you should consult with your own attorney before requesting exclusion, because the Partial Settlement may be your only chance to recover a portion of your loss.
>
> If you are eligible for inclusion in the Class and do not request exclusion in the manner and within the time described above, you will automatically be included as a Class Member and the proposed Partial Settlement (if and when approved by the Court), all orders or judgments issued by the Court in this litigation and any release given in connection with the Partial Settlement, will be binding upon you.

The Notice also specifically informed Class Members, "If you have pending your own claim or action against any person or entity in connection with an investment in any of the Partnerships (as defined below), you should consult with the attorney representing you, as this Consolidated Action, the certification of the Class, the proposed partial Settlement and this notice may affect your claim or your action." Immediately thereafter, the Notice stated in bold letters: **"THE RELEASE TO BE GIVEN TO THE PSI SETTLING DEFENDANTS AND THE RELEASED PARTIES IS VERY BROAD AND MAY IMPACT UPON**

OTHER RIGHTS OR CAUSES OF ACTION YOU HAVE."

The notice procedure approved by this Court included: 1) mailing the Notice to all Class Members who could be identified with "reasonable effort" by Lead Class Counsel with the cooperation of the PSI Settling Defendants by making their books, records and information available to Lead Class Counsel ("Class Notice"); and publishing the Notice in the national editions of *The Wall Street Journal, The New York Times,* and *U.S.A. Today* by Lead Class Counsel twice within ten days of the Class Notice mailing ("Published Notice"). Both the Class Notice and Published Notice informed Class Members of the necessity to opt-out by October 30, 1995 if a Class Member desired to proceed individually with his or her claims against any of the Settling Defendants or Released Parties.

On November 17, 1995, this Court held a fairness hearing on the proposed Stipulation and Agreement of Partial Compromise and Settlement dated August 9, 1995 and the Amended Plan of Allocation dated September 8, 1995 and on the Joint Fee Petition of plaintiffs' class counsel. None of the movants now seeking an extension of the deadline to opt-out appeared at the Fairness Hearing.

On November 20, 1995 this Court entered Findings of Fact and Conclusions of Law with respect to the Settlement and Amended Plan of Allocation. On November 20, 1995 this Court also entered an Order and Final Judgment approving the Settlement relative to plaintiffs' and the Class' claims against the PSI Settling Defendants, and an

order and Final Judgment Approving the Amended Plan of Allocation. Thereafter, various investors who by virtue of their inclusion within the Class definition and through their failure to opt-out by the October 30, 1995 deadline, have now been deemed Class Members who are barred from pursuing their claims against PSI in other forums, have moved the Court to grant them extraordinary relief from the Final Order, and permission to opt-out beyond the established deadline.

Discussion

In the pre-eminent case concerning the adequacy of class notice to absent class members, *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950), the Supreme Court stated that due process is met through "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Individual notice is to be sent to "all class members whose names and addresses may be ascertained through reasonable effort." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974). It is widely recognized that for the due process standard to be met it is not necessary that every class member receive actual notice, so long as class counsel acted reasonably in selecting means likely to inform persons affected. *Weigner v. The City of New York*, 852 F.2d 646, 649 (2d Cir. 1988), *cert. denied*, 488 U.S. 1005 (1989) ("[t]he proper inquiry is whether [class counsel] acted reasonably in selecting means likely to inform persons affected, not whether each [class member] actually received notice"); *Silber v. Mabon*, 18 F.3d 1449, 1453-54 (9th Cir. 1994); *In re VMS Limited*

Partnership Sec. Litig., No. 90 C 2412, 1995 WL 355722 at *2 (N.D. Ill. June 12, 1995); *Trist v. First Federal Savings & Loan Assoc. of Chester*, 89 F.R.D. 1, 2 (E.D. Pa. 1980) ("*Mullane* has never been interpreted to require the sort of actual notice demanded by the defendants, but rather only notice reasonably calculated to apprise interested parties of the nature of the object" [sic]). The Court is granted the power to direct the means of providing notice, subject only to these broad "reasonableness" standards imposed by due process. *Grunin v. International House of Pancakes*, 513 F.2d 114, 121 (8th Cir.) *cert. denied*, 423 U.S. 864 (1975).

This Court's August 29, 1995 Order required Class Counsel to send a copy of the Class Notice to each Class Member whose address could reasonably be located by first-class mail, and to publish a summary notice on two separate occasions in national editions of *The Wall Street Journal*, *The New York Times*, and *U.S.A. Today*. In complying with this Order, Class Counsel had notice mailed to each identifiable Class Member's last known address, a procedure that has been given wide-spread approval in other class actions. *See, e.g., Grunin*, 513 F.2d at 121 (mailing notice to last known address of class members constitutionally adequate even where one-third of class members were not reached by mailing); *Weinberger v. Kendrick*, 698 F.2d 61, 71 (2d Cir. 1982), *cert. denied*, 464 U.S. 818 (1983) (rejecting appellants' contention that the mailing of individual notice to the last known addresses of all class members was inadequate); *Trist*, 89 F.R.D. at 3 (approving notice procedure, stating "[t]he failure to send notice to 37 or even 137 must be considered together with the fact that notice was given to 25,000 other similarly

situated class members without provoking a single objection").

While "[a]dequacy of notice to the class as a whole determines the binding effect of a class settlement on an individual class member," *In re VMS Sec. Litig.*, No. 89 C 9448, 1992 WL 203832 at *5 (N.D. Ill. Aug. 13, 1992), a Court retains the power to allow claimants to file late opt-out requests pursuant to Fed. R. Civ. P. 6(b)(2)[2], 60(b)[3] or 23(d)[4]. Courts have usually relied on Rule 6(b)(2) in considering motions for an extension to opt-out of the class, *Georgine v. Amchem Products, Inc.*, No. Civ. A. No. 93-0215, 1995 WL 251402 at *4 (E.D. Pa. April 26, 1995), but the standard for granting relief under all three provisions is generally the same: excusable neglect. *See Supermarkets General Corp. v. Grinnel Corp.*, 490 F.2d 1183, 1186 (2d Cir. 1974) ("The same consideration requires rejection of Supermarkets' argument that its time to opt-out should have been extended under Fed. R. Civ. P. 6(b)(2) or 60(b)(1), or in the court's general discretion under Rule 23 itself. We assume that Rule 6(b)(2) and 60(b)(1) cover excusable neglect by a party or by its attorneys, or by both, and we also agree with appellant that the relevant standards are no different if the matter is viewed as arising simply under the court's discretion to implement

---

[2] Fed. R. Civ. P. 6(b) provides the method by which a court may in its discretion, for cause shown, enlarge a period of time within which a party is required or allowed to do an act.

[3] Fed. R. Civ. P. 60(b) provides in relevant part that a court can relieve a party from a final judgment if the judgment is "void," or for any other reason "justifying relief."

[4] Rule 23(d) allows the Court to make appropriate orders to manage a class action.

Rule 23"); *In re Del-Val Financial Corp. Sec. Litig.*, 154 F.R.D. 95, 96 (S.D.N.Y. 1994) ("In requesting to be excluded from the class after the November 2, 1993 opt-out deadline, Ms. Health is essentially requesting an enlargement of time to opt-out under Fed. R. Civ. P. 6(b)(2)").[5] A moving party must show both good faith and a reasonable basis for not acting within the specified period. *Id.* Even upon a finding of excusable neglect, it remains within the district court's sole discretion whether or not to grant the extension. *Georgine*, 1995 WL 251402 at *4. Factors to be considered in making this decision include: the interests of the movants, the interest of the defendants, and the impact of granting the requested extensions on the Settlement itself. *Id.*

The few movants that have beseeched the Court's relief present a plethora of reasons why their actions constitute the "excusable neglect" that should afford them the opportunity to opt-out after the deadline. These petitions can generally be classified as falling into the following categories: movants claiming that they did not receive the Class Notice because it was mailed to an old address; movants who were involved in litigations with PSI during the time of the Settlement proceedings, and claim that PSI is now estopped from seeking to terminate

---

[5] Fed. R. Civ. P. 60(b)(6) grants the Court wide discretion to afford relief from a final judgment for "any reason justifying relief," leading some courts to analyze motions for an extension to opt out of a class brought under this provision separately from those brought under Fed. R. Civ. P. 6(b). *See, e.g., In re VMS Limited Partnership sec. Litig.*, 1995 WL 355722 (N.D. Ill. June 12, 1995). Even under Rule 60(b)(6), however, a court will not grant relief absent "extraordinary circumstances." *Id.* at *2.

such litigation with them because of PSI's failure to inform them (or their litigation counsel) of the pendency of the Class Action within those individual proceedings; movants who may or may not have received the Notice, but contend that PSI would not be prejudiced by allowing them to opt-out late because PSI was aware of their intention to continue pursuit of their individual actions against PSI; and movants who received the Notice, but did not opt-out because they did not believe that the Settlement covered their claims. The Court will deal with each of these claims in turn.

1. Incorrect Address

As indicated above, actual receipt of class notice is not necessary in order to bind an absent class member to a final judgment. Indeed, many of the cases standing for this proposition also indicate that notice by mail sent to the last known address of the absent class member meets the due process requirement of notice through "reasonable effort" even where numerous class members have since changed addresses and do not receive notice. *See, e.g., Weinberger v. Kendrick,* 698 F.2d 61, 71 (2d Cir. 1982), *cert. denied,* 464 U.S. 8181 (1983) (approving of mailing of individual notices to the last known addresses of all class members, because the district court "found this procedure adequate and we see no reason to disturb this finding, particularly since no alternative method of ascertaining class members' identities has been suggested to us"); *Grunin v. International House of Pancakes,* 513 F.2d 114, 121 (8th Cir.), *cert. denied,* 423 U.S. 864 (1975) (procedure approved even where one-third of class members were not reached); *Trist v. First Federal Savings & Loan*

Assoc. of Chester, 89 F.R.D. 1, 3 (E.D. Pa. 1980). This standard has been upheld even in cases where the class member had notified the defendant of a change in address. *In re VMS Limited Partnership Sec. Litig.*, No 90 C 2412, 1995 WL 355722 at *2 (N.D. Ill. June 12, 1995).[6]

In providing the Class Claims Administrator with the addresses to which the direct mail Notice was sent, PSI used the address which appeared in a data base maintained by PSI of all purchasers of PSI's Direct Investment Group Partnerships. This data base, which was utilized by PSI in connection with the SEC Claims Fund procedures, was considered by PSI to be the best practicable source for identifying class members for this action. Accordingly, the Court has denied the motions for extension of time based on this ground.

2. Estoppel/Lack of Prejudice

A second group of movants who had individual actions pending against PSI at the time of the op-out period seek exclusion on the ground that they or their litigation counsel were not given individual supplemental notice of the Class Settlement within the confines of their individual proceedings. The crux of their argument is that PSI's failure to give them such notice now estops PSI from seeking to have that litigation or arbitration dismissed.

---

[6] This procedure was upheld in *Grunin, supra,* even without further notice by publication, a precautionary measure that was taken here.

It is well-established that "pendency of an individual action does not excuse a class member from filing a valid request for exclusion." *Berman v. L.A. Gear. Inc.*, No. 91 Civ. 2653, 1993 WL 437733 at *5 n.1 (S.D.N.Y. Oct. 26, 1993), *aff'd*, 29 F.3d 621 (2d Cir. 1994); *Supermarkets Gen. Corp. v. Grinnell Corp.*, 59 F.R.D. 512, 513 (S.D.N.Y. 1973), *aff'd.*, 490 F.2d 1183 (2d Cir. 1974) (individuals not excluded from class by mere fact of having filed an independent action). Since initiation of separate litigation did not confer upon these Class Members a right to notice above and beyond that due other Class Members, the motions brought on this ground must fail.[7]

A similar argument made by some of the movants who had been engaged in separate litigation or arbitration with PSI at the time of the Settlement Proceedings is that PSI would not be prejudiced by allowing these

---

[7] While actual receipt of notice is not required to make the Settlement binding on absent class member, *see* discussion *supra*, it is worthy of note that several of the movants engaged in litigation with PSI at the time of the opt-out period were represented by counsel who was simultaneously representing other Class Members who *did* receive the Notice. Notice conferred upon a class member's counsel may be imputed to the class member herself. *See, e.g., Langford v. Devitt*, 127 F.R.D. 41, 44-45 (S.D.N.Y. 1989) ("The only conclusion to be drawn from these representations is that John T. Murray [movant's counsel] received actual notice of the class certification in the case at bar. John T. Murray, unlike a layman, was then in a position to understand the significance and potential effects of the class action, the means available to review the details of the class action, and the legal options regarding participation in the class action. He was also in a position to understand the significance of not having received formal notice and how to correct that problem").

movants to opt-out late because their individual proceedings put PSI on notice of their intention to continue pursuit of their claims. As indicated above, this argument is wholly without merit. In making its decision whether or not to waive the "blow" provision, PSI considered the quantity and quality of the exclusion requests *timely* received and regarded all other pending litigations and arbitrations as encompassed within the $110,000,000 Settlement. Thus, in making its Settlement offer, PSI bargained for the precise finality that these movants now seek to undermine. The motions brought on this ground must fail as well.

3. Settlement Scope

A final group of movants did not contend that they failed to receive notice, but rather claimed that they did not return their opt-out forms in a timely manner because they were not aware that the claims they had brought (or would bring) against PSI were covered by the Settlement. The Settlement Agreement defined "Settled Claims" as:

> any and all claims . . . or causes of action, whether based on federal, state, local, statutory or common law or any other law, rule or regulation . . . that have been asserted in any forum by the Class Members . . . against any of the Released Parties . . . which relate in any way to the marketing, purchase, sale or holding of Units or other interests in, or to the operation, oversight, monitoring or management of, any of the Partnerships during the Class Period.

The claims brought under this theory involved current and former employees of PSI who made investments in

the limited Partnerships, but seek to recover against PSI for the harm to their business reputation that they incurred through sale of the Partnerships and for other related injury arising out of their sale of these investments, which they sometime denominate by "employment claims." Because the Class consisted of all purchasers of the designated Partnerships within the defined period, those present and former employees who did not invest in the Partnerships are not barred by the Settlement from pursuing such claims, while those who did make investments are. Movants asserted that this preclusion was not made clear by the terms of the Settlement Notice, and that even if clear, the Settlement Release casts too broad a scope and should be redefined.

As to the Notice's clarity, the Notice specifically advised Class Members with claims pending against PSI to "consult with the attorney representing you, as this Consolidated Action, the certification of the Class, the proposed partial Settlement and this Notice may affect your claim or your action. The Notice immediately thereafter also stated in bold letters: "**THE RELEASE TO BE GIVEN TO THE PSI SETTLING DEFENDANTS AND THE RELEASED PARTIES IS VERY BROAD AND MAY IMPACT UPON OTHER RIGHTS OR CAUSES OF ACTION YOU HAVE.**" This same admonition was repeated, again in bold letters, at paragraph 10 of the Notice. Thus, regardless of whether or not a given Class Member believed his claim to be covered by the Settlement, he was at least on notice that he should make a further inquiry. Numerous similarly-situated brokers and their counsel who read the Class Notice did file timely opt-outs.

As to the broadness of the Release's scope, the Court need not address the merits of such a claim. The Notice informed all recipients of the ability to voice any objections they might have to the Settlement at the Fairness Hearing held on November 17, 1995. None of the movants who seek leave to opt-out late were present at such hearing or filed a timely objection and their allegations of the scope concerning the Release are presented to the Court too late.

In support of their various petitions, movants presented a number of cases in which motions for leave to file a late exclusion form were granted. *See, e.g., In re Del-Val Financial Corp. Sec. Litig.*, 154 F.R.D. 95 (S.D.N.Y. 1994); *Mars Steel Corp. v. Continental Illinois National Bank and Trust Co. of Chicago*, 120 F.R.D. 51 (N.D. Ill. 1988). None of these cases, however, involved the type of "blow" provision involved here and, in contrast to the severe prejudice that PSI would incur were the relief sought here granted, most of the courts granting such leave specifically noted that neither party would be prejudiced by the granting of the motion. *See, In re Del-Val*, 154 F.R.D. at 96-97 ("Our holding is supported by the fact that I/JL is not one of the Settling Defendants and hence will not be prejudiced if Ms. Heath opts-out of the class at this time"); *Mars Steel Corp.*, 120 F.R.D. at 53 ("Finally, we note that Continental does not contradict movants' position that Continental will not be prejudiced by this enlargement of time").

Finally, the Court has considered the potential impact that a grant of the relief sought would have on this Settlement. In this regard the court notes that granting leave to file untimely exclusions "would undermine the

finality of judgments entered therein and would discourage settlement of such actions. Defendants would be loath to offer substantial sums of money in compromise settlements of class actions unless they can rely on the notice provisions of Rule 23 to bind class members." *In re VMS Limited Partnership Sec. Litig.*, No 90 C 2412, 1995 WL 355722 at *2 (N.D. Ill. June 12, 1995) (citations omitted).

The Court having considered the interest of all parties, and the potential impact that a grant of leave would have on the Settlement itself, accordingly finds that movants' motions for a grant of leave to file late exclusions are and should be denied.

Dated: New York, NY
February 1, 1996

SO ORDERED

/s/ Milton Pollack
Milton Pollack
Sr. U.S. District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In Re: PRUDENTIAL SECURITIES INCORPORATED LIMITED PARTNERSHIPS LITIGATION	MDL Docket No. 1005 M-21-67 (MP) THIS DOCUMENT PERTAINS TO THE ACTIONS LISTED IN FOOTNOTE 1 BELOW

THE JACKSONS' MOTION AND BRIEF FOR EXCLUSION FROM CLASS AND FOR RELIEF FROM ORDER AND FROM FINAL JUDGMENT

TO THE HONORABLE MILTON POLLACK,
SENIOR UNITED STATES DISTRICT JUDGE:

COMES NOW MACDANIEL JACKSON and MIRIAM JACKSON, Movants, by their undersigned counsel, and respectfully move this Court to grant them additional time to exercise an election to be excluded from any classes established in these proceedings, and, alternatively, to exclude them from the class established by this Court by its Order, dated November 20, 1995, entered in the captioned matter[1] (herein, the "Class Order"), and

[1] The "Class Order" recited that it will be entered in each of the following cases: *Bottner v. A.G. Spanos Residential Partners-86, et al.*, 93 Civ. 7708 (S.D.N.Y.); *Kahn v. Prudential-Bache Properties, Inc., et al.*, 93 Civ. 5976 (S.D.N.Y.); *Dumbroff, et al. v. Avron B. Fogelman, et al.*, 93 Civ. 6261 (S.D.N.Y.); *Gorman v. Almahurst, Inc., et al.*, 93 Civ. 8805 (S.D.N.Y.); *Kinnes, et al. v. Prudential Securities Group, Inc., et al.*, 93 Civ. 654 (D. Ariz.); *Massad, et al. v. Prudential Insurance Co., et al.*, 93 Civ. 5095 (D.N.J.). References herein to "this matter", "this proceeding"

further move this Court to grant them relief from the provisions of the said Class Order and from the final judgment made therein, and for other and further relief, and in support thereof would respectfully show as follows:

1. Movants were purchasers of various limited partnership interests and of other securities sold by Prudential Securities, Inc. and/or Prudential-Bache, Incorporated and/or the successors, predecessors or affiliates of said entities (all of the same being herein referred to collectively as "Prudential"), during one or more times during the "Settlement Class Period", defined by this Court's Class Order, being the time period between January 1, 1980 and June 8, 1994.

2. On December 7, 1995 Movants first received that certain "Notice of Pendency of Class Action, Proposed Partial Settlement of Class Action, Settlement Fairness Hearing, Right to Appear and Right to Request Exclusion from Partial Settlement of Class Action" dated September 19, 1995 (herein, the "Class Notice").

3. Movants received this Class Notice on December 7, 1995 from, upon their best belief, from [sic] Prudential. This was the first notice that Movants had received of the pendency of the Class Action or of the Class Notice and the Movants [sic] failure to obtain Notice was not due to any fault or omission on the part of the Movants but rather the Movants would show was due to the actions of

---

and other, similar references will be deemed to include each and all of the foregoing cases.

Prudential. It was received after the date to opt out of the class.

4. On December 8, 1995 Movants' counsel first received that certain "Notice of Pendency of Class Action, Proposed Partial Settlement of Class Action, Settlement Fairness Hearing, Right to Appear and Right to Request Exclusion from Partial Settlement of Class Action" dated September 19, 1995 (herein, the "Class Notice").

5. There is currently pending before the Dallas, Texas office of the American Arbitration Association (herein, the "AAA"), under AAA cause number 71-136-00014-95 styled *MacDaniel Jackson and Miriam Jackson v. Prudential Securities, Inc.* (herein, the "Arbitration Proceeding"), which Arbitration Proceeding was commenced with the AAA on or about January 12, 1995 and which has been conducted vigorously, by Prudential and by Movants, continuously thereafter. A copy of the complaint is attached as Exhibit A to MacDaniel Jackson's Affidavit. The Arbitration Proceeding is set for final hearing on January 15, 1996. The Arbitration Proceeding covers, in part, some of the partnerships that were covered in this action.

6. By letter of December 7, 1995 from Donald R. Littlefield, a Vice-President and Assistant General Counsel of Prudential (a copy of said letter being attached as Exhibit "A" to Jerome Ferguson's Affidavit), Mr. Littlefield gave notice to Movants' counsel of the said Class Order, and provided a partial copy of said Class Order. Prior to receipt by Movants' counsel of Prudential's letter, Movants' counsel was unaware of the pendency of the

Class Action despite the fact that the Arbitration Proceedings had been going on since January 1995.

7. As stated previously, the Movants actually received the Class Notice on December 7, 1995. Attached as Exhibit "B" to Mr. Jackson's Affidavit are true and correct photocopies of the forms in this class proceeding, entitled "Proof of Claim and Release" which accompanied the said Class Notice (herein, the "Proof of Claim"), as to Movants' former account number 0DS809363 and former account number 025878957 with Prudential which were first received by Mr. Jackson on December 7, 1995.

8. As is shown on the face of each Proof of Claim it was sent to Movants at the following address:

MCDANIEL JACKSON . . .
C/O PRUDENTIAL SECURITIES
10440 N CENTRAL EXPWY # 1600
DALLAS, TX 75231-2222

This address is, in fact, the address of the offices of *Prudential*, and which address is *not* the address of Movants. This has not been the address of Movants for approximately one and one-half years. Movant MacDaniel Jackson previously was an employee with Prudential, but his employment and association with Prudential was terminated in April 1994. As a result of Prudential's termination of Movant's association and/or employment with Prudential, Prudential is charged with the knowledge that Movants no longer maintained any address at the former office employment [sic].

9. Moreover, MacDaniel Jackson took the step of notifying Prudential in writing on January 3, 1995 to

change his address to his Charlotte, North Carolina home (Exhibit C to Jackson's Affidavit). Prudential obviously did not change the address despite both the written instructions and numerous oral instructions.

10. As stated hereinabove, the AAA Arbitration Proceeding was filed on or about January 12, 1995. Prudential has been aware of the pendency of the Arbitration Proceeding continuously since very soon after the Arbitration Proceeding was commenced.

11. Prudential's mailing of the Class Notices and Proof of Claim forms to an incorrect former address of Movants, and Prudential's use of the incorrect address for Movants in these proceedings resulted in a lack of notice to Movants. This lack of notice results in a denial to Movants of notice of the pendency of proceedings in this matter, and further results in a denial to Movants of due process, of fair notice and of an opportunity to be heard in these proceedings and of the opportunity to opt out of the certified class herein.

12. The Class Notice forms are dated September 19, 1995, but Movants did not receive their copies of said forms until December 7, 1995 the same day Mr. Littlefield wrote his letter. This is obviously more than a coincidence. On information and belief, Prudential employees, at the said Prudential office address in Dallas, Texas, obviously failed promptly to forward to Movants the Proof of Claim forms and Class Notice forms in this proceeding, once the said forms were received at the Prudential office address shown on the Proof of Claim forms. The failure of Prudential, and of Prudential's employees, to forward said documents promptly to

Movants results in a denial to Movants of notice of the pendency of proceedings in this matter, and further results in a denial to Movants of due process, of fair notice and of an opportunity to be heard in these proceedings.

13. The use by Prudential of an incorrect address for Movants and Prudential's providing to case managers in these proceedings of an incorrect mailing address for Movants during the pendency of these proceedings, during a time when Prudential's counsel was aware of the pendency of the Arbitration Proceeding, and the failure of Prudential to notify Movants of the pendency, nature and consequences to Movants of these class action proceedings, until a time subsequent to the entry of the Class Order herein, results in a denial to Movants of notice of the pendency of proceedings in this matter, and further results in a denial to Movants of due process, of fair notice and of an opportunity to be heard in these proceedings and of the opportunity to opt out of the class.

14. Federal Rule of Civil Procedure 23 provides for notice in a class action maintained under subdivision (b)(3) thereof, by stating:

> "(c) . . .
>
> . . . .
>
> "(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will

> exclude the member from the class if the member so requests by a specified date; . . . "

A time period created by a court order for the taking of action may be extended, pursuant to F. R. Civ. P. 6:

> " . . . (b) **Enlargement.** When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause may at any time in its discretion . . . (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect . . . "

Federal Rule of Civil Procedure 60 enables a party to obtain relief from a prior final judgment, order or proceeding for various grounds, as excerpted below:

> "(**b**) . . . On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . (4) the judgment is void . . . The motion shall be made within a reasonable time . . . "

15. The acts and practices described hereinabove, including Prudential's own use of a known incorrect mailing address for the Jacksons, Prudential's failure to change and correct Movants' address after request by Movants, and Prudential's delay in forwarding the Class Notice from its Dallas offices to Movants' correct address, show Movants' good faith in making this request and constitute a reasonable basis for extending the time deadline within which the Jacksons might elect to opt out of a class and this class litigation, and so as to be relieved

from any final judgment rendered herein. Such good faith and reasonable basis constitute "excusable neglect" pursuant to Rule 6(b)(2) of the Federal Rules of Civil Procedure and cases decided thereunder. The Prudential Securities Incorporated Limited Partnerships Litigation, 158 F.R.D. 301 (S.D. N.Y. 1994) [hereinafter *Prudential Securities Partnerships Litigation*]; *In re Del-Val Financial Corp. Securities Litigation*, 154 F.R.D. 95 (S.D. N.Y. 1994) [hereinafter *Del-Val Securities Litigation*]; *Mars Steel Corporation v. Continental Illinois National Bank and Trust Company of Chicago*, 120 F.R.D. 51 (N.D. Ill. 1988) [hereinafter *Mars Steel Corporation*].

16. A motion for an opportunity to opt out of a certified class, subsequent to the expiration of the opt-out time period, has been analyzed by the Second Circuit and by the Southern District of New York pursuant to the "excusable neglect" standard under F. R. Civ. P. 6(b)(2). *Prudential Securities Partnerships Litigation*, 158 F.R.D. at 303.

17. Receipt of a Class Notice, subsequent to the expiration of the opt-out period, by an individual already engaged in an arbitration with a class defendant, has been held, in the Southern District of New York, to be a reason constituting "excusable neglect" within the meaning of F. R. Civ. P. 6(b)(2), when coupled with the recipient's lack of appreciation, because of her pending arbitration, that she would be bound by the Class Notice. *Del-Val Securities Litigation*, 154 F.R.D. at 96.

18. The complete lack of receipt of the Class Notice, by the Jacksons in this matter, is extremely similar to the

facts of *Mars Steel Corporation*, as described by the Northern District of Illinois Court:

> "Essentially, movants alleged that they were unaware of their inclusion in the class because they never received the settlement notice at their current address . . .
>
> . . . .
>
> " . . . it is clear that they did not know they had to act by a certain date because of their failure to receive the settlement notice at their current addresses . . . This confusion was compounded by Continental's failure to send the settlement notice to their current addresses. Although Continental had their current addresses and had corresponded to movants at their current addresses, it did not have the current address on the computer list used for mailing the settlement notices.
>
> . . . .
>
> "We find that movants have demonstrated their request is in good faith, and that they had a reasonable basis for not complying with the opt-out period." (120 F.R.D. at 52-53)

19. Because of the unique facts and circumstances surrounding MacDaniel Jackson's claim as more specifically stated in his Statement of Claim, MacDaniel Jackson desires to opt out of the class and to not participate in the Class Action but rather to pursue his claims in the arbitration proceeding. The Jacksons respectfully request that this Court enter its Order recognizing that the Jacksons have chosen to opt out of the class and will not participate in the class.

20. **WHEREFORE, PREMISES CONSIDERED, MOVANTS RESPECTFULLY MOVE THIS COURT** to enter its Order determining that:

(1) Movants are not members of the class herein, as said class is defined by the said Class Order, and that Movants are excluded from the class established by said Class Order;

(2) Movants will be permitted to maintain, prosecute and conduct the above-described AAA Arbitration Proceeding notwithstanding the provisions of the Class Order;

(3) and for such other and further relief to which Movants may show themselves to be justly entitled.

Respectfully submitted,

FERGUSON & COMPANY, P.C.,

By: /s/ Jerome H. Ferguson, III

Jerome H. Ferguson, III
State Bar of Texas
No. 06925400
300 Embassy Court
624 N. Good-Latimer
Expressway
Dallas, Texas 75204-5896
Telephone 214/824-5555
Fax 214/823-3888

CERTIFICATE OF CONFERENCE

The undersigned hereby certifies that a telephone conference was held with Mr. Littlefield and he advised me that Prudential would oppose this Motion. Therefore, this matter is submitted to the Court for determination.

/s/ Jerome H. Ferguson, III
Jerome H. Ferguson, III

NOTICE OF MOTION

PLEASE TAKE NOTE that upon the application of Movants, MacDaniel Jackson and Miriam Jackson, the said Movants' within and foregoing Motion and Brief for Exclusion from Class and for Relief from Order and from Final Judgment will be presented to the Honorable Milton Pollack, Senior United States District Judge for the Southern District of New York, at 10:30 AM on January 11, 1996, in Courtroom 1305 of the United States Courthouse, 40 Centre Street, New York, New York.

/s/ Jerome H. Ferguson, III
Jerome H. Ferguson, III

CERTIFICATE OF SERVICE

I CERTIFY that on this 21st day of December, 1995, I caused a copy of the within and foregoing instrument to be served upon the following counsel in this proceeding, by causing a copy of the same to be deposited in the

United States Mail, first-class postage prepaid, to the following addresses, all as stated below.

FERGUSON & COMPANY, P.C.,

By: /s/ Jerome H. Ferguson, III
Jerome H. Ferguson, III

Matthias Mone
CAHILL GORDON & REINDEL
80 Pine Street
New York, N.Y. 10005

Donald R. Littlefield
Vice-President & Assistant General Counsel
PRUDENTIAL SECURITIES, INC.
Suite 1550
10440 N. Central Expressway
Dallas, Tx. 75231

Melvyn I. Weiss
MILBERG WEISS BERSHAD HYNES & LERACH
One Pennsylvania Plaza
New York, N.Y. 10019

Lawrence A. Sucharow
Joel H. Bernstein
GOODKIND LABATON RUDOFF & SUCHAROW LLP
100 Park Avenue
New York, N.Y. 10017

Burton H. Finkelstein
FINKELSTEIN THOMPSON & LOUGHRAN
2828 Pennsylvania Avenue NW
Washington, D.C. 20007

Nicholas E. Chimicles
CHIMICLES, JACOBSEN & TIKELLIS
One Haverford Center
361 West Lancaster Avenue
Haverford, Pa. 19041-0100

H. Sullivan Bunch
BONNETT, FAIRBOURN, FRIEDMAN & BALINT, P.C.
4041 N. Central Avenue, # 1100
Phoenix, Arizona 85012-3311

Clinton Krislov
KRISLOV & ASSOCIATES
222 N. LaSalle St., Ste 810
Chicago, Il. 60601

William F. Duker
DUKER & BARRETT
1585 Broadway, 19th Floor
New York, N.Y. 10036

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In Re: PRUDENTIAL SECURITIES INCORPORATED LIMITED PARTNERSHIPS LITIGATION	MDL Docket No. 1005 M-21-67 (MP)

MACDANIEL JACKSON'S AFFIDAVIT IN SUPPORT OF THE JACKSONS' MOTION AND BRIEF FOR EXCLUSION FROM CLASS AND FOR RELIEF FROM ORDER AND FROM FINAL JUDGMENT

STATE OF NORTH CAROLINA §
§
COUNTY OF MECKLENBURG §

BEFORE ME, the undersigned authority, personally appeared MacDaniel Jackson, who, being by me duly sworn, deposed and said:

"1. My name is MacDaniel Jackson. I am over 18 years of age, of sound mind, capable of making this affidavit, and personally acquainted with the facts stated in it.

2. On or about January 12, 1995, I caused to be filed an Arbitration Proceeding with the American Arbitration Association against Prudential Securities. A copy of the complain is attached hereto as Exhibit A.

3. On or about December 7, 1995, I received a copy of the Class Notice including a Proof of Claim and Release which advised me of the pendency of the Class

Action. A copy of this notice is attached hereto as Exhibit B.

4. I had no notice nor knowledge of the current litigation entitled "Prudential Securities Incorporated Limited Partnerships Litigation", and I was unaware of the said litigation, until December 7, 1995 when I received the Class Notice and the Proof of Claim and Release form.

5. Until I received the Class Notice and the Proof of Claim and Release form, on or about December 7, 1995, I was unaware of the possibility that I might be a member of any class in this litigation and I was unaware that there might be, or that there might have previously been, any type of time deadline within which I might be required to elect, to remain in or to opt-out, of any class in this litigation.

6. I do not wish to be a member of any class in this "Prudential Securities Incorporated Limited Partnerships Litigation". I wish to "opt-out" and to be excluded from the classes in this litigation, and to be excluded from this litigation. I wish to proceed with my claim against Prudential Securities in the said Arbitration Proceeding which is currently pending before the American Arbitration Association.

7. The address used on the attached Proof of Claim form, which address is c/o Prudential Securities, 10440 N. Central Expressway #1600, Dallas, Texas 75231-2222, is the address of Prudential Securities, Incorporated. Said address has not been my nor my wife's business address since approximately April of 1994. Previously I was employed by or associated with Prudential Securities at

their office at the said address of 10440 North Central Expressway #1600, Dallas, Texas 75231, but my employment and association with Prudential Securities was terminated in April, 1994, so said address ceased to be my business address at the time of said termination.

8. On and after leaving my employment and association with Prudential Securities in Dallas in April, 1994, I notified Prudential Securities orally, many times throughout 1994, of my new address, and each time I asked that Prudential Securities change its records to reflect and to use my new address. In approximately November, 1994, I moved to my residence at 4203 Black Tree Lane, Charlotte, North Carolina 28226. At that time and thereafter, I notified Prudential Securities orally of my said address in Charlotte, North Carolina and I asked Prudential Securities to change its records to reflect and to use my said address in North Carolina. I so notified Prudential Securities by means of several conversations I had, in person and/or by telephone, with various Prudential Securities employees in Dallas, Texas. In spite of my conversations, Prudential Securities did not change my address in their records, and Prudential Securities continued to use as my address the incorrect address of 10440 North Central Expressway #1600, Dallas, Texas 75231.

9. Throughout 1994 and 1995, I believe that I may have failed to receive various items of mail, which I believe might have been sent to me at the erroneous address of Prudential Securities, stated above, and which have never been forwarded by Prudential Securities to me at my current, correct address in North Carolina.

10. On or about January 3, 1995, I sent to Prudential Securities a formal written request to change my address in their records. A copy of this letter is attached hereto as Exhibit C."

Further affiant sayeth not.

/s/ McDaniel Jackson
MacDaniel Jackson

SUBSCRIBED AND SWORN TO BEFORE ME on the 21st day of December, 1995, to certify which witness my hand and official seal.

(SEAL)

/s/ Viola L. Nothnagel
Notary Public,
State of North Carolina

My commission expires:

12-05-2000

PRU

Prudential Securities
Limited Partnerships Litigation
The Garden City Group, Claims Administrator
P.O. Box 9388, Garden City, N.Y. 11530-9388
Telephone: 1-(800)-327-3664
PROOF OF CLAIM AND RELEASE

Must be Postmarked
No Later Than
December 15, 1995

Tax ID Number
(Social Security Number or Employer ID Number) 250015323

00596467 Acct: 0DS809363

PRUDENTIAL SECURITIES C/F
MCDANIEL JACKSON
IRA DTD 09/26/84
C/O PRUDENTIAL SECURITIES
10440 N CENTRAL EXWY #1600
DALLAS, TX 75231-2222

Enter only if incorrect at left.

Social Security Number

OR

Employer ID Number

Name and Address corrections

App. 81

Purchases If any of the information below is incorrect, place an "x" in the corresponding Delete box and provide corrected information in Section P.

Partnership Name	Code	Trade Date	No. of Units	Price per Unit	Transaction Amt	Delete?
EQUITEC RL EST INV FD XIV	EQTEREI14	10/16/84	8.000	500.00	4,000	
xxxxxxxxxxxxxxxxxxxxxxxxxxxxxx	xxxxxxxxxx	xxxxxxxx	xxxxxxxxxxxx	xxxxxxxxxxxx	xxxxxxxxxxx	
xxxxxxxxxxxxxxxxxxxxxxxxxxxxxx	xxxxxxxxxx	xxxxxxxx	xxxxxxxxxxxx	xxxxxxxxxxxx	xxxxxxxxxxx	
xxxxxxxxxxxxxxxxxxxxxxxxxxxxxx	xxxxxxxxxx	xxxxxxxx	xxxxxxxxxxxx	xxxxxxxxxxxx	xxxxxxxxxxx	
xxxxxxxxxxxxxxxxxxxxxxxxxxxxxx	xxxxxxxxxx	xxxxxxxx	xxxxxxxxxxxx	xxxxxxxxxxxx	xxxxxxxxxxx	

P Purchases & Corrections
Please list additional or corrected purchases between Jan 1, 1980 and Jun 8, 1994 below. Documentation must be enclosed (see instructions).

Partnership Name (Name & Code selected from Schedule 1 or 2)	Code	Purchased From PRU *OR* Others	Trade Date mm dd yy	No. of Units	Price per Unit	Transaction Amt omit cents
P-BACHE ENER INC V P-18	PBEI18	x	08/87	96	250.000	$24,000

S Sales & Transfers
Please show sales and transfers between Jan 1, 1980 and Sep 18, 1995 below. Documentation must be enclosed (see instructions).

Partnership Name (Name & Code selected from Schedule 1 or 2)	Code	Trade Date mm dd yy	No. of Units	Price per Unit	Transaction Amt omit cents

EXHIBIT
B

U Unsold Please show holdings at the close of business on September 18, 1995. Documentation must be enclosed.
If holdings are the same as purchases shown above, please place an "X" here X **and do not complete this section.**

Partnership Name	Code	No. of Units

(Balance of "Proof of Claim and Release"

form omitted in printing.)

PRU

Must be Postmarked
No Later Than
December 15, 1995

Prudential Securities
Limited Partnerships Litigation
The Garden City Group, Claims Administrator
P.O. Box 9388, Garden City, N.Y. 11530-9388
Telephone: 1-(800)-327-3664
PROOF OF CLAIM AND RELEASE

Tax ID Number
(Social Security Number or Employer ID Number) 250015323

00175279 Acct: 025878957

MCDANIEL JACKSON
C/O PRUDENTIAL SECURITIES
10440 N CENTRAL EXPWY
STE 1600
DALLAS, TX 75231-2222

Enter only if incorrect at left.

Social Security Number

OR

Employer ID Number

Name and Address corrections

App. 82

Purchases If any of the information below is incorrect, place an "x" in the corresponding Delete box and provide corrected information in Section P.

Partnership Name	Code	Trade Date	No. of Units	Price per Unit	Transaction Amt	Delete?
P-BACHE ENER INC IV P-17	PBEI17	06/01/87	200.000	250.00	50,000	
xxxxxxxxxxxxxxxxxxxxxxxxxxxxxx	xxxxxxxxxx	xxxxxxxx	xxxxxxxxxxxx	xxxxxxxxxxxx	xxxxxxxxxxx	
xxxxxxxxxxxxxxxxxxxxxxxxxxxxxx	xxxxxxxxxx	xxxxxxxx	xxxxxxxxxxxx	xxxxxxxxxxxx	xxxxxxxxxxx	
xxxxxxxxxxxxxxxxxxxxxxxxxxxxxx	xxxxxxxxxx	xxxxxxxx	xxxxxxxxxxxx	xxxxxxxxxxxx	xxxxxxxxxxx	
xxxxxxxxxxxxxxxxxxxxxxxxxxxxxx	xxxxxxxxxx	xxxxxxxx	xxxxxxxxxxxx	xxxxxxxxxxxx	xxxxxxxxxxx	

P Purchases & Corrections
Please list additional or corrected purchases between Jan 1, 1980 and Jun 8, 1994 below. Documentation must be enclosed (see instructions).

Partnership Name (Name & Code selected from Schedule 1 or 2)	Code	Purchased From PRU *OR* Others	Trade Date mm dd yy	No. of Units	Price per Unit	Transaction Amt omit cents
P-BACHE ENER INC V P-18	PBEI18	x	04/88	206	250.000	$51,500
P-BACHE ENER INC V P-18	PBEI18	x	12/88	60	250.000	$15,000
P-BACHE ENER INC V P-18	PBEI18	x	12/88	146	250.000	$36,500

S Sales & Transfers
Please show sales and transfers between Jan 1, 1980 and Sep 18, 1995 below. Documentation must be enclosed (see instructions).

Partnership Name (Name & Code selected from Schedule 1 or 2)	Code	Trade Date mm dd yy	No. of Units	Price per Unit	Transaction Amt omit cents

U Unsold Please show holdings at the close of business on September 18, 1995. Documentation must be enclosed.
If holdings are the same as purchases shown above, please place an "X" here X **and do not complete this section.**

Partnership Name	Code	No. of Units

(Balance of "Proof of Claim and Release"

form omitted in printing.)

PRU

Must be Postmarked
No Later Than
December 15, 1995

Prudential Securities
Limited Partnerships Litigation
The Garden City Group, Claims Administrator
P.O. Box 9388, Garden City, N.Y. 11530-9388
Telephone: 1-(800)-327-3664
PROOF OF CLAIM AND RELEASE

Tax ID Number
(Social Security Number or Employer ID Number) 250015323

00596467 Acct: [illegible]
025878965

PRUDENTIAL SECURITIES C/F
MCDANIEL JACKSON
IRA DTD 09/26/84
C/O PRUDENTIAL SECURITIES
10440 N CENTRAL EXWY #1600
DALLAS, TX 75231-2222

Enter only if incorrect at left.

Social Security Number

OR

Employer ID Number

Name and Address corrections

App. 83

Purchases If any of the information below is incorrect, place an "x" in the corresponding Delete box and provide corrected information in Section P.

Partnership Name	Code	Trade Date	No. of Units	Price per Unit	Transaction Amt	Delete?
EQUITEC RL EST INV FD XIV	EQTEREI14	10/16/84	8.000	500.00	4,000	X
xxxxxxxxxxxxxxxxxxxxxxxxxxxxxx	xxxxxxxxxx	xxxxxxxx	xxxxxxxxxxxx	xxxxxxxxxxxx	xxxxxxxxxxx	
xxxxxxxxxxxxxxxxxxxxxxxxxxxxxx	xxxxxxxxxx	xxxxxxxx	xxxxxxxxxxxx	xxxxxxxxxxxx	xxxxxxxxxxx	
xxxxxxxxxxxxxxxxxxxxxxxxxxxxxx	xxxxxxxxxx	xxxxxxxx	xxxxxxxxxxxx	xxxxxxxxxxxx	xxxxxxxxxxx	
xxxxxxxxxxxxxxxxxxxxxxxxxxxxxx	xxxxxxxxxx	xxxxxxxx	xxxxxxxxxxxx	xxxxxxxxxxxx	xxxxxxxxxxx	

P Purchases & Corrections
Please list additional or corrected purchases between Jan 1, 1980 and Jun 8, 1994 below. Documentation must be enclosed (see instructions).

Partnership Name (Name & Code selected from Schedule 1 or 2)	Code	Purchased From PRU *OR* Others	Trade Date mm dd yy	No. of Units	Price per Unit	Transaction Amt omit cents
P-BACHE ENER INC V P-18	PBEI18	x	04/88	492	250.000	$123,000

S Sales & Transfers
Please show sales and transfers between Jan 1, 1980 and Sep 18, 1995 below. Documentation must be enclosed (see instructions).

Partnership Name (Name & Code selected from Schedule 1 or 2)	Code	Trade Date mm dd yy	No. of Units	Price per Unit	Transaction Amt omit cents

U Unsold Please show holdings at the close of business on September 18, 1995. Documentation must be enclosed.
If holdings are the same as purchases shown above, please place an "X" here X **and do not complete this section.**

Partnership Name	Code	No. of Units

(Balance of "Proof of Claim and Release"

form omitted in printing.)

McDaniel Jackson
4203 Black TreeLane
Charlotte, North Carolina 28226

Lisa Little
Purdential [sic] Securities
10440 North Central Expressway
Suite 1600
Dallas, Texas 75231

January 3, 1995

Dear Lisa,

Please Change my mailing address from: 8144 Walnut Hill Lane, Suite 397, Dallas, Texas 75231 to: 4203 Black Tree Lane, Charlotte, North Carolina 28226.

Thank you for your help.

Sincerely,
Mac

McDaniel Jackson

Thomas J. Kavaler (TK-8517)
Mathias E. Mone (MM-5881)
Cahill Gordon & Reindel
80 Pine Street
New York, New York 10005
(212) 701-3000
Attorneys for the PSI Settling Defendants

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PRUDENTIAL SECURITIES INCORPORATED LIMITED PARTNERSHIPS LITIGATION	MDL Docket No. 1005 M-21-67 (MP)

AFFIDAVIT IN OPPOSITION TO JACKSON MOTION

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

MATHIAS E. MONE, being duly sworn, deposes and says:

1. I am a member of the Bar of this Court and of the firm of Cahill Gordon & Reindel, counsel for Prudential Securities Incorporated ("PSI") in the above-entitled action. I submit this affidavit in response to the motion of Class Members MacDaniel and Miriam Jackson (the "Jacksons") to be excluded from the Class in order to proceed with prosecution of a Texas AAA arbitration wherein they seek damages from the PSI Settling Defendants based on their purchases of units of Energy Income,

a limited partnership interest covered by the class settlement in this action.

2. The motion is supported by an affidavit from Mr. Jackson attesting that he did not receive the direct mail Notice from the Claims Administrator because he had terminated his employment at the address to which that Notice was sent.

3. Direct mail notice was not the only notice provided to Class Members in this case. Pursuant to this Court's Order, a summary notice of the Class Settlement was twice published in the national editions of *The Wall Street Journal, The New York Times* and *USA Today*. The settlement and this Court's August 29, 1995 Preliminary Approval Order also received wide-spread national media coverage through press and wire service reports and a segment on CNN's nationally televised "Money Line" on August 30, 1995.

4. The address to which the direct mail Notice was sent to the Jacksons was provided to the Claims Administrator by PSI. That address, Prudential Securities, 10440 N. Central Expressway # 1600, Dallas, Texas 75231-2222, was the address which appeared in a data base maintained by PSI of all purchasers of PSI's Direct Investment Group partnerships. This data base, which was utilized by PSI in connection with the SEC Claims Fund procedures, was considered by PSI to be the best practicable source for identifying class members for this action.

5. Annexed hereto as Exhibit A is the affidavit of Joseph J. Nottolo [sic] sworn to January 12, 1996. Mr. Nottolo [sic] is – and was at the time Notice was mailed – the Operations Manager at Mr. Jackson's former PSI

branch. In his affidavit Mr. Nottolo [sic] recounts that he routinely forwarded promptly any and all mail received for former employees at that branch. I have confirmed with the Claims Administrator that two Notices, one for Mr. Jackson personally and one for his IRA, were mailed to the above address on September 11, 1995.

6. For the reasons stated herein and in the accompanying Memorandum of Law, the Jacksons' motion should be denied and the Jacksons should be directed to dismiss the PSI Settling Defendants from their pending Texas AAA arbitration.

/s/ Mathias E. Mone
MATHIAS E. MONE
Sworn to before me this
12th day of January 1996.

/s/ Ann Ajana
Notary Public
ANN AJANA
Notary Public,
State of New York
No. 01AJ4737081
Qualified in Nassau County
Certificate Filed
in New York County
Commission Expires
Dec. 31, 1997

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PRUDENTIAL SECURITIES INCORPORATED LIMITED PARTNERSHIPS LITIGATION	:	MDL Docket No. 1005 M-21-67 (MP)

AFFIDAVIT IN OPPOSITION
TO THE JACKSONS' MOTION

STATE OF TEXAS)
: ss.:
COUNTY OF DALLAS)

JOSEPH J. NITTOLO, being duly sworn, deposes and says:

1. Since August 30, 1993 I have been the Operations Manager in the North Dallas Office of Prudential Securities Incorporated ("PSI"). I make this affidavit on personal knowledge and submit it in response to the motion of Class Members MacDaniel and Miriam Jackson.

2. One of my responsibilities at PSI is to review incoming mail that is sent to the North Dallas Office and to set aside clients' correspondence for the Branch Manager's review. I personally review the mail that comes to the office addressed to former employees.

3. This branch has received mail addressed to MacDaniel Jackson subsequent to the termination of his employment here. I have personally collected any such mail as it is received and forwarded it to Mr. Jackson. It is my common practice to forward such mail to Mr. Jackson

on the day it is received or, at the very latest, one day after its receipt. I have also in the past telephoned Mr. Jackson to let him know that we received mail addressed to him and that I was forwarding those items promptly.

4. I have reviewed the affidavit of MacDaniel Jackson submitted in this matter and I disagree with his assertions. My above-described practice of regularly and promptly forwarding mail addressed to Mr. Jackson was carried out without deviation. I did not withhold forwarding the Notice of Class Certification and Settlement until late November or early December as Mr. Jackson's affidavit implies.

/s/ Joseph J. Nittolo
JOSEPH J. NITTOLO

Sworn to before me this
12th day of January 1996.

/s/ Sherri Brummett
Notary Public

SHERRI BRUMMETT
Notary Public
STATE OF TEXAS
(SEAL) My Commission
Expires 09-07-99

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In Re: PRUDENTIAL SECURITIES INCORPORATED LIMITED PARTNERSHIPS LITIGATION

MDL Docket No. 1005 M-21-67 (MP)

THE JACKSONS' MOTION AND BRIEF FOR RECONSIDERATION OF ORDER

TO THE HONORABLE MILTON POLLACK,
SENIOR UNITED STATES DISTRICT JUDGE:

COMES NOW MACDANIEL JACKSON and MIRIAM JACKSON, Movants, by their undersigned counsel, and respectfully move this Court to reconsider its Order Number 44 herein dated January 19, 1996 (herein, the "Previous Order"), which Order was issued by this Court with respect to the Jacksons' Motion and Brief for Exclusion from Class and for Relief from Order and from Final Judgment previously filed herein (herein, the "Previous Motion"), and for other and further relief, and in support thereof would respectfully show as follows:

1. By the Jacksons' Previous Motion, the Jacksons moved this Court to exercise its discretion to grant the Jacksons an additional time period within which the Jacksons might elect to be excluded from the Class certified herein, or alternatively that this Court order the Jacksons to be relieved from the Order and Final Judgment entered herein dated November 20, 1995 which is Order Number 38 herein (herein, the "Final Judgment"), and that this

Court enter its Order permitting the Jacksons to continue with a certain existing arbitration proceeding before the American Arbitration Association.

2. This Court's Previous Order denied all such relief sought by the Jacksons. The Previous Order stated that the Jacksons are Class Members in this action and are bound by the said Final Judgment, and ordered the Jacksons to dismiss with prejudice all of their claims asserted in the certain arbitration proceeding except for their claim relating to their purchase of life insurance policies.

3. The Jacksons respectfully move this Court to reconsider its Previous Order and, accordingly, to issue its Order pursuant to F. R. Civ. P. 60(b)(4) relieving the Jacksons from the Final Judgment because said Final Judgment is void as to the Jacksons; and, alternatively, to grant the Jacksons pursuant to F. R. Civ. P. Rule 6(b)(2) an additional time period within which to elect to be excluded from the Class herein, and, in either such event, to permit the Jacksons to proceed with the certain arbitration proceeding before the American Arbitration Association identified in the Previous Motion, and in support thereof would show as follows.

4. Approximately January 3, 1995, Mr. Jackson advised Prudential in writing of Mr. Jackson's current new address, which was an address in Charlotte, North Carolina. (Previous Motion, Paragraph 9 at Page 4; and Jackson Affidavit thereto, at Exhibit C.)

5. The "Notice of Pendency of Class Action" previously-approved by this Court and dated September 19, 1995 (herein, the "Class Notice"), together with Proof of Claim form, was addressed to the Jacksons, in care of the

offices of Prudential Securities. The address used was a Prudential office address of 10440 North Central Expressway, # 1600, Dallas, Texas. (Previous Motion, paragraph 8 at page 4; and Jackson Affidavit thereto, at Exhibit B.) Mr. Jackson stated in his Affidavit that he did not receive the Class Notice nor Proof of Claim form until December 7, 1995. Said date was subsequent to the opt-out deadline date and the date of the hearing for approval of the Final Judgment.

6. Thus, Prudential did not give any notice of the pendency of this class action to Mr. Jackson, at any address, prior to the hearing in this proceeding which resulted in this Court's Final Judgment. Instead, Prudential sent the Notice and Proof of Claim forms to be received by itself, in care of itself, at its Dallas offices.

7. By the use of Prudential's own address for mailing of the Class Notice, Prudential accordingly failed to cause the Class Notice to be sent to Mr. Jackson at his actual and correct address, an address of which Mr. Jackson gave notice to Prudential approximately nine months prior to the date of the Class Notice.

8. Prudential is charged with knowledge of the inaccuracy of the address it used for the mailing of the Class Notice to Mr. Jackson. The address used by Prudential was not the Jacksons' address for approximately one and one-half years prior to the Class Notice date of September 19, 1995, because of Prudential's termination in approximately April, 1994 of Mr. Jackson's employment with Prudential. (Previous Motion, paragraph 8 at page 4).

9. For the purposes of F. R. Civ. P. 23(c)(2), individual notice must be sent to all class members whose names and addresses may be ascertained through reasonable effort. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, at 172 (1974). For class members whose names and addresses are easily ascertainable, individual notice by mail is the "best notice practicable" pursuant to F. R. Civ. P. Rule 23(c)(2). *Eisen*, at 175.

10. The address used by Prudential for mailing of the Class Notice to Mr. Jackson was not the "last known address" of Mr. Jackson. Mr. Jackson's change of address letter to Prudential was sent to Prudential approximately nine months prior to the date of the Class Notice. Mr. Jackson's said letter advised Prudential of Mr. Jackson's correct address. The Affdavit of Joseph Nittolo, attached to Prudential's Memorandum of Law in opposition to the Jacksons' Previous Motion, refers to Mr. Nittolo's forwarding of mail to Mr. Jackson and, thus, constitutes an admission by Prudential that Prudential was aware of an address for Mr. Jackson other than the Dallas, Texas address used for the Proof of Claim and Class Notice, (Prudential Memorandum of Law, Nittolo Affidavit at paragraph 4.)

11. Mailed notice may be inadequate to provide Due Process, when the person sending the notice is aware that the recipient does not reside at the mailing address. *Weigner v. City of New York*, 852 F. 2d 646 (2nd Cir. 1988), at 650, note 4, and cases therein cited.

12. Individual notice of the pendency of a class action – as opposed to notice of a potential class action settlement – is not a discretionary consideration to be

waived in a particular case. It is, instead, an unambiguous requirement of F. R. Civ. P. 23. Persons to whom no such notice of pendency of the class action was sent are not bound by a judgment in said action. *Trist v. First Federal Savings & Loan Association of Chester,* 89 F.R.D. 1 (E.D. Penna. 1980), at page 3. (Citing *Eisen*).

13. Thus, under the unique circumstances of this matter, Prudential sent the notice of pendency of this class action to be received by itself, at its own, obvious office address. The use of a Prudential office address, under Prudential's own name, as the address used for the Jacksons is not the "best notice practicable" to the Jacksons.

14. The address used by Prudential for mailing of the Class Notice to the Jacksons was not the "last known address" of the Jacksons. Mr. Jackson sent notice of his current address to Prudential, approximately nine months prior to the date of the Class Notice.

15. Notice of the pendency of a class action is an unambiguous requirement of F. R. Civ. P. 23, as stated in *Trist, supra.* Under *Trist,* persons not receiving notice of the pendency of the action are not bound by the judgment therein. The Jacksons did not timely receive the Class Notice. As the result, the Jacksons should not be bound by, and should be relieved from, the Final Judgment.

16. As stated in the Previous Motion, the Second Circuit, and the Southern District of New York, have analyzed a motion for an opportunity to opt out of a certified class, subsequent to the expiration of the opt-out deadline, pursuant to the "excusable neglect" standard of

F. R. Civ. P. 6(b)(2). (Previous Motion, Section 16 at Page 8, citing *Prudential Securities Incorporated Limited Partnerships Litigation,* 158 F.R.D. 301 [S.D. N.Y. 1994].)

17. Lack of receipt of a class notice until after the expiration of the opt-out period has been held to constitute "excusable neglect", pursuant to the cases cited in the First Motion, *In re Del-Val Financial Corp. Securities Litigation,* 154 F.R.D. 95 (S.D. N.Y. 1994), and *Mars Steel Corporation v. Continental Illinois National Bank and Trust Company of Chicago,* 120 F.R.D. 51 (N.D. Ill. 1988).

18. As discussed in *Mars Steel,* an incorrect address was used for mailing of a class notice, despite the sender's possession and use of the recipient's correct address for other purposes. Those facts of *Mars Steel* are essentially identical to the facts described in the Jacksons' Previous Motion.

19. Thus, upon the unique facts with which the Jacksons are involved, the Jacksons have demonstrated their good faith and an "excusable neglect" sufficient, pursuant to F. R. Civ. P. 6(b)(2) and the cases cited above, to permit this Court to exercise its discretion and to grant the Jacksons an extension of the deadline, ordered by this Court, for the Jacksons' election to opt-out from the Certified Class herein.

20. **WHEREFORE, PREMISES CONSIDERED, MOVANTS RESPECTFULLY MOVE THIS COURT** to reconsider its said Previous Order entered herein as to the Jacksons' Previous Motion, and, upon such reconsideration, that this Court enter its Order that:

(1.) Movants are not bound by that Final Judgment previously entered herein;

(2.) Movants have shown good faith and excusable neglect, and that this Court exercises its discretion to permit the Jacksons an extension of time within which the Jacksons may elect to be excluded from the Certified Class herein;

(3.) Movants are not members of the Certified Class herein, as said Class is defined by the Final Judgment, and that Movants are excluded from the class established by said Final Judgment;

(4.) Movants will be permitted to maintain, prosecute and conduct the AAA Arbitration Proceeding described in the Jacksons' Previous Motion, notwithstanding the provisions of the Final Judgment herein;

(5.) and for such other and further relief to which Movants may show themselves to be justly entitled.

Respectfully submitted,

FERGUSON & COMPANY, P.C.,

By: /s/ Jerome H. Ferguson, III
Jerome H. Ferguson, III
SBOT No. 06925400
300 Embassy Court
624 N. Good-Latimer
Expressway
Dallas, Texas 75204-5896
Telephone 214/824-5555
Fax 214/823-3888

NOTICE OF MOTION

PLEASE TAKE NOTE that upon the application of Movants, MacDaniel Jackson and Miriam Jackson, the said Movants' within and foregoing Motion and Brief for Reconsideration of Order will be presented to the Honorable Milton Pollack, Senior United States District Judge for the Southern District of New York, at 10:30 AM on February 13, 1996, in Courtroom 1305 of the United States Courthouse, 40 Centre Street, New York, New York.

/s/ Jerome H. Ferguson, III
Jerome H. Ferguson, III

CERTIFICATE OF SERVICE

I CERTIFY that on this 26th day of January, 1996, I caused a copy of the within and foregoing instrument to be served upon the following counsel in this proceeding, by causing a copy of the same to be deposited in the United States Mail, first-class postage prepaid, to the following addresses, all as stated below.

FERGUSON & COMPANY, P.C.,

By: /s/ Jerome H. Ferguson, III
Jerome H. Ferguson, III

Matthias Mone
CAHILL GORDON & REINDEL
80 Pine Street
New York, N.Y. 10005

Donald R. Littlefield
Vice-President & Assistant General Counsel
PRUDENTIAL SECURITIES, INC.
Suite 1550
10440 N. Central Expressway
Dallas, Tx. 75231

Melvyn I. Weiss
MILBERG WEISS BERSHAD HYNES & LERACH
One Pennsylvania Plaza
New York, N.Y. 10019

Lawrence A. Sucharow
Joel H. Bernstein
GOODKIND LABATON RUDOFF & SUCHAROW LLP
100 Park Avenue
New York, N.Y. 10017

Burton H. Finkelstein
FINKELSTEIN THOMPSON & LOUGHRAN
2828 Pennsylvania Avenue NW
Washington, D.C. 20007

Nicholas E. Chimicles
CHIMICLES, JACOBSEN & TIKELLIS
One Haverford Center
361 West Lancaster Avenue
Haverford, Pa. 19041-0100

H. Sullivan Bunch
BONNETT, FAIRBOURN, FRIEDMAN & BALINT, P.C.
4041 N. Central Avenue, # 1100
Phoenix, Arizona 85012-3311

Clinton Krislov
KRISLOV & ASSOCIATES
222 N. LaSalle St., Ste 810
Chicago, Il. 60601

William F. Duker
DUKER & BARRETT
1585 Broadway, 19th Floor
New York, N.Y. 10036

PRUDENTIAL SECURITIES

LAW DEPARTMENT

December 7, 1995

Jerome H. Ferguson, III Esq.
Ferguson and Burns
300 Embassy Court
624 North Good-Latimer Expressway
Dallas, Texas 75204-5850

RE: *In re Prudential Securities Limited Partnerships Litigation,* United States District Court, Southern District of New York; MDL Docket No. 1005, M-21-67 (MP)
and
MacDaniel Jackson vs. Prudential Securities, Inc – Dallas, TX
American Arbitration Number 71 136 00014 95

Dear Mr. Ferguson:

We write to advise you that on November 20, 1995 Senior United States District Judge Milton Pollack signed and entered an Order and Final Judgment (the "Order") in the above-entitled multidistrict action pending in the Southern District of New York. A copy of the Order (without Schedules 1 and 2 and Exhibit A) is enclosed for your convenience.

The Order (1) certified a class of purchasers of specified limited partnership interests against Prudential Securities Incorporated ("PSI") and certain of its present and former employees, parents and affiliates (the "PSI settling Defendants"), (2) approved a Settlement Agreement between the PSI Settling Defendants and the Class, (3) released all Settled Claims by members of the Class

against the PSI Settling Defendants and (4) *permanently barred and enjoined Class Members from instituting, commencing or prosecuting any Settled Claims against the Released Parties.*

The Court retained *exclusive jurisdiction* for *all matters* relating to the litigation including *interpretation* of the Settlement Agreement and *enforcement* of the Order.

Your client is a Class Member bound by the Order and the claim you are asserting is a Settled Claim released by the Order. Under the terms of the Settlement Agreement, your client has until December 15, 1995 to file a Proof of Claim in order to participate in the distribution of the Settlement proceeds. Any questions with regard to the Settlement should be directed to Class Counsel [George Bauer of Milberg, Weiss, Bershad, Hynes & Lerach, 1 Pennsylvania Plaza, New York, NY 10119-0165, telephone (212) 594-5300 or Lawrence A. Surcharow of Goodkind, Labaton, Rudoff & Sucharow, 100 Park Avenue, New York, NY 10017-5563, telephone (212) 907-0700].

Under these circumstances we request that you immediately dismiss your pending arbitration against PSI and/or any other PSI Settling Defendant. If we have not received notice of your dismissal within ten days of the date of this letter, PSI will bring motions before Judge

Pollack for enforcement of the Order and Final Judgment, including costs and/or contempt if warranted.

Sincerely yours,

/s/ Donald R. Littlefield
Donald R. Littlefield
Vice President
Assistant General Counsel

cc: George Bauer, Esq. (w/o encl.)
Lawrence Sucharow, Esq. (w/o encl)
Thomas J. Kavaler, Esq. (w/o encl.)
John H. Bluher, Esq. (w/o encl.)
Kimberly Emerson - AAA

DRL/cl

c:\

Nos. 96-1731, 96-1732

Supreme Court, U.S.
FILED
MAY 29 1997
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

LESLIE AND DOROTHY BISHOFBERGER,

Petitioners,

—against—

IN RE: PRUDENTIAL SECURITIES INCORPORATED LIMITED PARTNERSHIP LITIGATION, MDL DOCKET NO. 1005,

Respondent.

MACDANIEL JACKSON and MIRIAM JACKSON,

Petitioners,

—against—

IN RE: PRUDENTIAL SECURITIES INCORPORATED LIMITED PARTNERSHIP LITIGATION, MDL DOCKET NO. 1005,

Respondent.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT PRUDENTIAL SECURITIES INCORPORATED IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI

THOMAS J. KAVALER
80 Pine Street
New York, New York 10005
(212) 701-3000

Counsel of Record

Of Counsel:

MATHIAS E. MONE
JOHN M. MCSHERRY
CAHILL GORDON & REINDEL
(a partnership including a
professional corporation)
New York, New York

30 pp

QUESTIONS PRESENTED

By the Bishofberger Petitioners

Where an absent class member admittedly received the mailed notice of a class action settlement over one month prior to the opt-out deadline but inexplicably failed to take any steps to opt out, was the court below correct in affirming the district court's discretionary denial of that class member's request belatedly to opt out of the class under Rule 60(b)?

By the Jackson Petitioners

Where notice of a class action settlement was mailed to an absent class member prior to the expiration of the opt-out period and the class member did not carry his burden of establishing that he did not receive it, was the court below correct in affirming the district court's discretionary denial of that class member's request belatedly to opt out of the class under Rules 6(b) and 60(b)?

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

COUNTER-STATEMENT OF THE CASE 2

Background 3

Petitioners' Post-Judgment Motions

Leslie and Dorothy Bishofberger 4

MacDaniel and Miriam Jackson 6

The Decisions of the Court of Appeals 7

SUMMARY OF ARGUMENT 8

REASONS FOR DENYING THE WRITS

I. THE BISHOFBERGERS' PETITION IS UNTIMELY 10

II. NEITHER PETITION RAISES ANY ISSUE WORTHY OF THIS COURT'S CONSIDERATION 11

CONCLUSION 15

APPENDIX 1a

TABLE OF AUTHORITIES

Cases PAGE

Browder v. *Director, Department of Correction*, 434 U.S. 257 (1978) 14

Department of Banking v. *Pink*, 317 U.S. 264 (1942) .. 11

Eisen v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974) 12, 14, 14n

FCC v. *League of Women Voters*, 468 U.S. 364 (1984) . 11

FTC v. *Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206 (1952) 11

Greene v. *Lindsey*, 456 U.S. 444 (1982) 13

Gross v. *Barnett Banks, Inc.*, 934 F. Supp. 1340 (M.D. Fla. 1995) 13, 13n

Grunin v. *International House of Pancakes*, 513 F.2d 114 (8th Cir.), *cert. denied*, 423 U.S. 864 (1975) . 14n

Lujan v. *National Wildlife Federation*, 497 U.S. 871 (1990) 14

Mennonite Board of Missions v. *Adams*, 462 U.S. 791 (1983) 12-13

Missouri v. *Jenkins*, 495 U.S. 33 (1990) 11

Mullane v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) 12, 13n, 14, 14n

Peters v. *National Railroad Passenger Corp.*, 966 F.2d 1483 (D.C. Cir. 1992) 13

Phillips Petroleum Co. v. *Shutts*, 472 U.S. 797 (1985) 13n

PAGE

Rules:

Fed. R. Civ. P.

Rule 6(b) ..... *passim*

Rule 23(e) 13, 13n

Rule 60(b) ..... *passim*

Rule 60(b)(4) 14

U.S. Sup. Ct. Rules

Rule 10 12

Rule 13.1 ..... 6n, 10

Rule 13.3 10

Rule 15.2 2

Rule 29.6 ..... 2n

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

Nos. 96-1731, 96-1732

LESLIE AND DOROTHY BISHOFBERGER,

Petitioners,

—against—

IN RE: PRUDENTIAL SECURITIES INCORPORATED LIMITED PARTNERSHIP LITIGATION, MDL DOCKET NO. 1005,

Respondent.

MACDANIEL JACKSON and MIRIAM JACKSON,

Petitioners,

—against—

IN RE: PRUDENTIAL SECURITIES INCORPORATED LIMITED PARTNERSHIP LITIGATION, MDL DOCKET NO. 1005,

Respondent.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT PRUDENTIAL SECURITIES INCORPORATED IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI

Respondent Prudential Securities Incorporated ("PSI")[1] respectfully submits that writs of certiorari to review the decisions of the United States Court of Appeals for the Second Circuit should not issue because these decisions do not conflict—nor are they even said by either Petitioner to conflict—with that of any other circuit, because no question worthy of the exercise of this Court's certiorari jurisdiction is presented and because, in any event, the decisions below are in all respects correct.

COUNTER-STATEMENT OF THE CASE

The factual statements in the petitions contain numerous misstatements and omissions which necessitate this counter-statement pursuant to Supreme Court Rule 15.2.

These Petitions are related to a pending Petition filed by John D. and Christal Toland ("the Tolands"), Docket No. 96-1538. All three petitions arise out of the $110 million partial settlement in a multi-districted class action styled *In re Prudential Securities Incorporated Limited Partnerships Litigation*, MDL No. 1005 ("MDL 1005"). Like the Tolands, Petitioners Leslie and Dorothy Bishofberger ("the Bishofbergers") and MacDaniel and Miriam Jackson ("the Jacksons") are members of the Class certified by the Final Judgment entered by Senior United States District Judge Milton Pollack of the Southern District of New York. Because they neglected to exclude themselves from the Class by opting out prior to the court-imposed deadline, Petitioners are now bound by the Final Judgment, including its provision enjoining the continued prosecution of Settled Claims against

---

[1] Pursuant to Supreme Court Rule 29.6, PSI advises the Court that neither it nor its ultimate parent, The Prudential Insurance Company of America, a mutual insurance company, nor any subsidiary or affiliate has issued shares to the public.

PSI and other Released Parties.[2] Like the Tolands, Petitioners seek the issuance by this Court of writs of certiorari to review the parochial and inherently fact-specific issues of whether the Court of Appeals properly affirmed Judge Pollack's denial of their respective motions, pursuant to Rules 6(b) and 60(b) of the Federal Rules of Civil Procedure, for extraordinary relief from the Final Judgment and permission belatedly to opt out of the Class in order to prosecute claims against PSI which are barred and enjoined by the Final Judgment.

Background

The factual background of MDL 1005, the terms of the Settlement (including the court-ordered procedures for the dissemination of the Notice) and the course of the proceedings in the District Court to confirm the Settlement leading up to and including the entry of the Final Judgment—all of which are fundamental to an understanding of the issues raised by these Petitions and yet are only cursorily (and even then, often inaccurately) mentioned therein—are described in detail in PSI's Brief in Opposition to the Tolands' Petition ("Br. Opp."). To avoid needless repetition, PSI respectfully refers the Court thereto (Br. Opp. at 3-9), and sets forth below only those facts relevant to the individual circumstances of Petitioners Bishofberger and Jackson, respectively.

---

[2] Capitalized terms have the same meaning ascribed to them in the Settlement Agreement found in the Appendix filed with the Court of Appeals at A65-A73. In addition, references herein to the Petitions are designated as "[name of petitioner] Pet. at ___." References herein to the Appendices annexed thereto are designated as "[name of petitioner] Pet. App. at ___"). References to the Appendix hereto are designated as "App at ___". References to "A ___" are to the Appendices filed by Appellants in the Court of Appeals for the Second Circuit on their appeal below.

Petitioners' Post-Judgment Motions

Leslie and Dorothy Bishofberger

Although the Bishofbergers acknowledged that they received the Class Notice in "late September" 1995—over one month prior to the October 30, 1995 deadline set by the court for filing exclusions from the Class (A1541)—they argued that they had no reason to believe it applied to them because they erroneously thought that they fell within an exclusion to the Class definition for investors who had executed timely submission agreements and agreed to be bound by the Expedited Dispute Arbitration Procedure ("EDAP") under the SEC Fund.[3] However, through their own neglect, the Bishofbergers' submission agreement to EDAP was in fact not filed with the SEC Claims Administrator until October 19, 1995 (over three months after the July 6, 1995 deadline for doing so (A1559-60)) and thus their request to participate in EDAP was denied in that forum.

In support of their Rule 60(b) motion, the Bishofbergers contended that "[t]he SEC Claims Administrator can hear our

---

[3] Prior to the consolidation in MDL 1005 of the various private actions filed against PSI, PSI and the Securities Exchange Commission ("SEC") entered into a consent decree under which PSI agreed to provide reparations to settle claims arising out of the same limited partnership failures at issue in MDL 1005 (the "SEC Fund"). (A607) The SEC Fund was under the general supervision of the United States District Court for the District of Columbia (Greene, J.) and was presided over by a Court-approved Claims Administrator, former SEC Commissioner Irving Pollack. (A607) The SEC Fund's Claims Resolution Process required PSI to mail notices to all eligible investors informing them of the SEC Fund. Eligible investors were then required to submit claims directly to PSI. PSI was obligated either to offer the claimant a monetary settlement or reject the claim. Investors who were dissatisfied with PSI's monetary offer, or whose claims PSI rejected, could either pursue their claims in other fora or enter EDAP. (A607-08) Investors who wished to participate in EDAP were required to complete and timely file a submission agreement. (A608) The database of investors created to comply with the SEC Fund requirements was later utilized to send the Class Notices in MDL 1005.

request for excusable neglect to allow us back into the SEC process However, he can only hear this if we are excluded from this class action." (A1583) Thus, the Bishofbergers needed to demonstrate excusable neglect before Judge Pollack in order to argue additional excusable neglect before the SEC Claims Administrator—a request Judge Pollack politely deemed "highly irregular." (A1584)

Moreover, the Bishofbergers' moving papers admitted that, aside from their professed confusion over their status vis-a-vis the SEC EDAP proceedings, by October 12, 1995—over two weeks prior to the opt-out deadline set by Judge Pollack—they were aware that they had not filed a submission agreement in accordance with EDAP and that the deadline for doing so had long passed. (A1541-42) The Bishofbergers, then, were fully aware on October 12, 1995 that they were Class Members bound by the Settlement unless they opted out by October 30, 1995. Despite this knowledge and this 18-day window, the Bishofbergers neither timely opted out nor initiated contact with the SEC Claims Administrator to determine if they were still eligible to participate in that Fund, nor initiated contact with Lead Class Counsel (whose names, addresses and telephone numbers were listed on the Notice that they received in September 1995) for guidance about the consequences of failing to opt out in a timely manner.

The Bishofbergers maintained that their startling neglect in connection with both the SEC Fund and the Class Settlement proceedings was excusable due to the illness of their "financial advisor" and former broker. (A1540) They claim to have relied on this lay advisor, who never submitted an affidavit, for advice in filling out forms and to assure that deadlines were met. (A1534) His illness apparently lasted several months (although he was fit to counsel them in late September 1995 when they received the Notice (A1542)) and throughout that time they never took any action to inquire as to their status in either the SEC Fund or the Class Settlement. This, however, was not the end of their lethargy, for despite

having received notification on November 11, 1995 that their request for submission to EDAP was rejected for tardiness (A1548), the Bishofbergers neither attended the November 17, 1995 Fairness Hearing nor raised any timely objection to the Settlement.

Judge Pollack denied the Bishofbergers' motion for extraordinary relief (A1610) and they thereafter appealed to the Court of Appeals.[4]

MacDaniel and Miriam Jackson

The Jacksons moved pursuant to Rules 6(b) and 60(b) to be excluded from the Class in order to proceed with the prosecution of their pending arbitration against PSI. (A745) The Jacksons premised their motion on their alleged untimely receipt of the Class Notice. The Jacksons do not dispute that the Class Notice was mailed to them, nor that they received it. The Claims Administrator confirmed that in fact two Notices, one for Mr. Jackson personally and one for his IRA account, were mailed to him on September 11, 1995. (A805c) Nevertheless, Mr. Jackson, a former PSI employee and industry insider, asserted that he did not receive the Class Notice until (and first learned of the widely publicized Settlement on) December 7, 1995 because it was sent to his former PSI office address, which was the last address shown for him on the PSI database utilized by the Claims Administrator for mailing the Class Notice.

The Jacksons argued that PSI's failure to provide the Claims Administrator with their current address, which led to

---

[4] The Bishofbergers' and their counsel's campaign of apathy continues in this Court. The Bishofbergers did not file their Petition until April 28, 1997—122 days after the Court of Appeals' entry of the Summary Order affirming the District Court's denial of their motion. To circumvent their violation of Supreme Court Rule 13.1, the Bishofbergers attempt to piggy-back onto the Jacksons' petition for rehearing below—in which they did not join. As set forth, *infra*, the Bishofbergers' Petition is untimely and should be denied on that ground alone.

the purported delay in their receipt of the Class Notice, constitutes sufficient grounds for extraordinary relief. (A748) Pretermitting the legal irrelevance of this argument, PSI submitted an affidavit from Joseph Nottolo, the Operations Manager at the PSI branch where Mr. Jackson was formerly employed. (A805d) Mr. Nottolo attested that in the ordinary course of business any mail addressed to Mr. Jackson was routinely "forward[ed] . . . to Mr. Jackson on the day it [was] received or, at the very latest, one day after its receipt" at the branch. (A805e) In addition, Mr. Nottolo specifically denied the Jacksons' unsupported speculation that he had delayed forwarding the Class Notice to Mr. Jackson. (A805e)

Judge Pollack was skeptical of the Jacksons' contention that they did not receive the Class Notice until the same day that their lawyer called them to inquire as to its receipt and denied the Jacksons' motion as well as their subsequent motion for reconsideration. The Jacksons thereafter filed several notices of appeal.[5]

The Decisions of the Court of Appeals

The Bishofbergers' and Jacksons' appeals were consolidated in the Court of Appeals with four other appeals (including the Tolands') from Judge Pollack's orders denying requests for permission belatedly to opt out of the Class. On December 27, 1996, the Court of Appeals unanimously and summarily affirmed each of those orders appealed from.

With respect to the Bishofbergers, the Court of Appeals held that given their admitted timely receipt of the Notice,

---

[5] The Jacksons were the only members of this 100,000-plus member Class to purport to appeal from the Final Judgment approving the Settlement—notwithstanding the untimeliness of their appeal and their dubious assumption of standing to do so. On PSI's motion, the Court of Appeals dismissed as untimely that part of the Jacksons' appeal which purported to be from the Final Judgment. They do not challenge that dismissal in this Court.

their knowledge that their EDAP form had not been timely filed and their failure to heed the Notice's warning that they should consult an attorney regarding any questions, Judge Pollack did not abuse his discretion in denying their motion. (Toland Pet. App. at 23) This purported abuse of discretion by the District Court is what the Bishofbergers presently seek to have reviewed by this Court.

As for the Jacksons, the Court of Appeals noted that as the movants they had the burden of proof to demonstrate sufficient grounds for extraordinary relief. (Toland Pet. App. at 11) The Court of Appeals held that the District Court's determination that the Jacksons had failed to meet their burden and the court's "skepticism" concerning Mr. Jackson's claim that he did not receive the two Notices until after the opt-out deadline were not abuses of discretion. *Id.* The Jacksons thereafter petitioned the Court of Appeals for rehearing, which was denied on January 27, 1997. (Jackson Pet. at 10)

SUMMARY OF ARGUMENT

The instant Petitions seek writs of certiorari to review the myriad and fact-specific excuses offered by Petitioners (and rejected by the courts below) for their failures to opt out of the Class in a timely manner. The facial "uncertworthiness" of these Petitions is perhaps best described by the Bishofbergers themselves who candidly acknowledge that the "narrow issue before this court [sic] is whether the district court abused its discretion in denying the Bishofbergers the right to opt out of the class after the initial deadline had passed." (Bishofberger Pet. at 4) We are hard pressed better to articulate why this Court—which is not in the business of curing putative abuses of discretion, *vel non*—should deny their Petition.

The Jacksons, whose credibility the District Court questioned, attempt to obfuscate the parochial nature of their Petition and instead urge that the garden-variety, prototypical

notice procedures adopted by the District Court failed to satisfy due process because they did not *guarantee* that the Jacksons would receive the Notice in a timely manner. This Court has now been presented with three Petitions in this matter, all of which challenge the propriety of the Notice procedures. And yet, interestingly, none of the Petitioners before this Court established that they failed to receive some notice of the Class proceedings prior to the expiration of the opt-out period. The Tolands, for example, admitted (Toland Pet. at 9) that they were on actual notice of the Class Settlement nearly two weeks before the expiration of the opt-out period. The Bishofbergers likewise admit (Bishofberger Pet. at 3) that they received the Notice over one month prior to the opt-out deadline. The Jacksons failed to persuade the District Court that they did not receive in a timely manner the two Notices mailed to them notwithstanding their ambiguous assertions to the contrary. These facts, coupled with the overwhelming response of this 100,000-member Class to the mailed notice program (Br. Opp. at 23 n23), render unavailing Petitioners' individual and collective efforts to fashion a grievance of constitutional magnitude.

In short, these Petitions represent nothing more than yet another effort by disappointed litigants to reargue the merits of their motions which were fully and fairly litigated in both courts below. Like the Tolands, Petitioners do not identify, nor does there exist, any ground upon which writs of certiorari should be granted. None of the questions purportedly raised by the Petitions presents either a conflict among the circuits, a conflict between the ruling of the Court of Appeals and any ruling of this Court, or any otherwise important and unresolved federal question of general and widespread applicability. To say they are fact-specific is an understatement.

REASONS FOR DENYING THE WRITS

I. THE BISHOFBERGERS' PETITION IS UNTIMELY

At the outset, the Court should deny the Bishofbergers' Petition because it is untimely under Supreme Court Rule 13.1, which provides that a petition for a writ of certiorari must be filed within ninety days after entry of the judgment of the court below. Although the Court of Appeals entered its judgment on the Bishofbergers' appeal on December 27, 1996 (Toland Pet. App. at 1), they did not file their Petition until April 28, 1997, well over ninety days later.

The Bishofbergers attempt to avoid the consequences of their latest procedural gaffe by noting that their Petition was filed within ninety days of the Court of Appeals' order denying rehearing *to the Jacksons*. (Bishofberger Pet. at 1) The Bishofbergers, however, never filed a petition for rehearing in the Court of Appeals; the petition to which they refer was filed solely by the Jacksons and not joined in by the Bishofbergers and is therefore irrelevant to the timeliness of the Bishofbergers' Petition for certiorari. The Jacksons' petition for rehearing (which the Bishofbergers did not even bother to append) sought relief particular to the Jacksons alone. Their petition entitled "Petition for Rehearing by Plaintiffs-Appellants MacDaniel Jackson and Miriam Jackson," states explicitly that "[i]n this Petition for Rehearing,the Jacksons do not seek rehearing as to any Appellants other than the Jacksons, nor as to any appeal other than the Jacksons' appeal." (App. at 2a) Indeed, the fact that the Bishofbergers felt the need to file this very Petition for certiorari in addition to the Tolands' and the Jacksons' filings indicates their own recognition that any relief granted by this Court to any other petitioners would not encompass the Bishofbergers' claims absent a separate filing of the type they failed to make in the Court of Appeals.

Although Supreme Court Rule 13.3 states that a timely motion for rehearing tolls "for all parties" the running of the three months' period in which a petition for certiorari may be

presented to this Court, this rule benefits only those petitioners for whom the motion for rehearing "actually seeks an 'alteration of the rights adjudicated' in the lower court's first judgment." *FCC* v. *League of Women Voters*, 468 U.S. 364, 373 n.10 (1984) (quoting *Department of Banking* v. *Pink*, 317 U.S. 264, 266 (1942)). As the Jacksons' petition for rehearing could have had no effect on the Court of Appeals' adjudication of the Bishofbergers' rights, the Jacksons' petition did not toll the running of the filing period for the Bishofbergers.[6] *See FTC* v. *Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 212 (1952) (dismissing petition for certiorari as untimely because lower court's subsequent order did not "disturb[ ] or revise[ ] legal rights and obligations which, by its prior judgment, had been plainly and properly settled with finality"); *Department of Banking*, 317 U.S. at 266 (holding that petition for certiorari was untimely where motion to amend below did not seek an alteration of the rights adjudicated and therefore the finality of the lower court's prior order was never suspended). As this Court has held that the ninety-day limit for filing a petition for certiorari in a civil action is mandatory and jurisdictional, *see Missouri* v. *Jenkins*, 495 U.S. 33, 45 (1990), the Bishofbergers' Petition should be denied as untimely.

II. NEITHER PETITION RAISES ANY ISSUE WORTHY OF THIS COURT'S CONSIDERATION

Wholly apart from their failure to file a timely petition, the Bishofbergers do not even attempt to identify any legal authority (much less any intercircuit controversy) in support of their Petition. Stymied by their admitted receipt of the Class Notice over *one month* prior to the opt-out deadline and

---

[6] The Bishofbergers were in no way a "party" to the Jacksons' appeal to the Court of Appeals, as is evident on the faces of the separate Notices of Appeal they filed. (A1681; A1684) The appeals were consolidated for briefing and argument purely as a matter of judicial economy.

their failure to act on such Notice, the Bishofbergers instead embark upon a lengthy diatribe in which they accuse PSI, Class Plaintiffs, Lead Class Counsel and the District Court of conspiring to create a "Kafkaesque proceeding." (Bishofberger Pet. at 8) While the Bishofbergers' paranoid conspiracy theory might make for an entertaining Oliver Stone production, it simply does not implicate any issue worthy of this Court's consideration.

Similarly, the issues sought to be raised by the Jacksons' Petition amount to nothing more than yet another request for error-correction which, even if meritorious, would not warrant the exercise of this Court's certiorari jurisdiction. *See* Supreme Court Rule 10. Their contentions, which repeat the same tired arguments heard and rejected by the courts below, are wholly without merit. The Jacksons follow the Tolands' lead in contending that the notice procedures did not comply with this Court's rulings in *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), and *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974), because they failed to ensure that each Class Member actually *received* the Notice at the proper address. As discussed in PSI's brief opposing the Tolands' Petition, however, there is no support for the proposition that due process requires actual receipt by every absent class member of a mailed notice of a proposed class settlement. (*See* Br. Opp. at 22-24) Rather, what is required is that notice procedures be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane*, 339 U.S. at 314.

The plethora of cases cited by the Jacksons in their Petition (many of which were not cited to the Court of Appeals) do not dictate a different result. Instead, the legal authority relied on by the Jacksons only underscores the holding of the court below, consistent with *Mullane* and *Eisen*, that due process requires not perfect notice but the "best notice practicable under the circumstances." *See, e.g., Mennonite Board of Mis-*

sions v. *Adams*, 462 U.S. 791, 800 (1983) (holding that notice by mail "or other means as certain to ensure actual notice" is required to satisfy due process); *Greene* v. *Lindsey*, 456 U.S. 444, 454 (1982) (noting that "reasonableness of the notice provided must be tested with reference to the existence of `feasible and customary' alternatives and supplements to the form of notice chosen") (quoting *Mullane*, 339 U.S. at 315).[7]

In essence, the Jacksons argue that each and every one of the 100,000-plus addresses on the PSI database specifically created to provide a list of affected investors for the SEC Fund should have been verified and re-verified to guarantee 100% accuracy before the Notices were mailed. There is simply no support for this Jacksonian view of the requirements of due process. *See, e.g.*, *Peters* v. *National Railroad Passenger Corp.*, 966 F.2d 1483 (D.C. Cir. 1992) (no due process violation where address on mailing list was inaccurate); *Gross* v. *Barnett Banks, Inc.*, 934 F. Supp. 1340, 1345 (M.D. Fla. 1995) (verification of addresses on mailing list not required to satisfy due process).

Finally, to support their contention that the District Court incorrectly judged the adequacy of the Notice by the more lenient standards of Rule 23(e) (Jackson Pet. at 20-22), the Jacksons distort the District Court's Opinion. The Jacksons assert that the District Court relied exclusively on Rule 23(e)

---

[7] The Jacksons also cite this Court's decision in *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797 (1985), as authority for their ill-conceived argument that due process requires actual receipt of a mailed notice. *Shutts*, however, is factually inapposite to the present case as it addresses the question of a court's exercise of personal jurisdiction over out-of-state class plaintiffs. Moreover, in relying on *Mullane*, *Shutts* actually reinforces the District Court's holding that notice to absent class members need only be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.* at 811 (quoting *Mullane*, 339 U.S. at 314-15). *See also Gross* v. *Barnett Banks, Inc.*, 934 F. Supp. 1340, 1344 (M.D. Fla. 1995) (citing *Shutts* for holding that actual receipt of mailed notice not required to satisfy due process).

cases. A plain reading of the Opinion which expressly relies on *Mullane* and *Eisen*, however, demolishes this contention. (Jackson Pet. App. at 53)[8]

Equally unpersuasive is the Jacksons' attempt in Part III of their Petition to manufacture an issue regarding the standard of review. The Jacksons contend that the Court of Appeals erroneously applied an abuse of discretion standard and failed to conduct a *de novo* review of the District Court's denial of their Rule 60(b)(4) motion. (Jackson Pet. at 25-26) First, this argument ignores that the Jacksons moved for relief on numerous grounds, including Rules 60(b) and 6(b). (Jackson Pet. App. at 69-71) In reviewing the District Court's denial of the Jacksons' motions under these rules—including the District Court's determination that the Jacksons had failed to satisfy their burden of demonstrating excusable neglect—the Court of Appeals properly applied an abuse of discretion standard. *Browder* v. *Director, Department of Corrections*, 434 U.S. 257, 263 n.7 (1978) (appeals from denials of Rule 60(b) motions reviewed "only for abuse of discretion"); *Lujan* v. *National Wildlife Federation*, 497 U.S. 871, 895-96 (1990) (Rule 6(b) confers discretionary standard). Second, as to the Jacksons' Rule 60(b)(4) motion, the Court of Appeals did in fact conduct a *de novo* review of the Notice procedures.[9] That

---

[8] The Jacksons blatantly and inexcusably ignore that part of the District Court's opinion which discussed *Mullane* and *Eisen* and instead point to the court's citation to *Grunin* v. *International House of Pancakes*, 513 F.2d 114 (8th Cir.), *cert. denied*, 423 U.S. 864 (1975), as evidence of its putative error. Although *Grunin* involved Rule 23(e) notice, the Eighth Circuit cited *Eisen* for the proposition that due process does not guarantee receipt of class notice—a proposition that is nowhere refuted in any case cited by the Jacksons (or, for that matter, the Tolands).

[9] A review of the transcript of the oral argument of these consolidated appeals (which the Jacksons' Supreme Court counsel did not attend) will reveal that the Court of Appeals, through its vigorous questioning of PSI's counsel regarding the adequacy of the notice pro-

the Court of Appeals, which heard six consolidated appeals of multiple appellants, did not explicitly enumerate its approval of the notice procedures in its opinion does not warrant the inference that it did not conduct the proper inquiry.

CONCLUSION

The Petitions for writs of certiorari should be denied.

Dated: New York, New York
May 28, 1997

Respectfully submitted,

THOMAS J. KAVALER
80 Pine Street
New York, New York 10005
(212) 701-3000

Counsel of Record

Of Counsel:

Mathias E. Mone
John M. McSherry
CAHILL GORDON & REINDEL
(a partnership including
a professional corporation)
80 Pine Street
New York, New York 10005
(212) 701-3000

---

cedures, did in fact review the adequacy of the notice procedures *de novo* prior to addressing Judge Pollack's alleged abuses of discretion.

APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 95-9209 (Lead) and 96-7147 (Con)

In Re: PRUDENTIAL SECURITIES INCORPORATED LIMITED PARTNERSHIP LITIGATION, MDL DOCKET NO. 1005

MATT NILSON, DAVID MATUS, MELINDA MATUS, LESLIE BISHOFBERGER, DOROTHY BISHOFBERGER, THOMAS BARRETT, JAMES M. BARRETT, REBECCA BARRETT, Executrix of the Estate of James Barrett, CARL ROBA, JAY JABLONSKI, VINCENT LAZARA, and JEFFREY A. SCHILLER,

Movants-Appellants,

—v.—

PRUDENTIAL SECURITIES INCORPORATED,

Respondent-Appellee.

JOHN D. TOLAND and CHRISTAL TOLAND, as husband and wife and d/b/a The John Toland Company, MACDANIEL JACKSON, and MIRIAM JACKSON,

Plaintiffs-Appellants,

—v.—

IN RE: PRUDENTIAL SECURITIES INCORPORATED LIMITED PARTNERSHIP LITIGATION,

Defendant-Appellee.

PETITION FOR REHEARING, BY PLAINTIFFS-APPELLANTS MACDANIEL JACKSON and MIRIAM JACKSON

Plaintiffs-Appellants MacDaniel Jackson and Miriam Jackson (the "Jacksons") respectfully make this Petition to this Court of Appeals, for the Court's rehearing of this matter as to the appeal made herein by the Jacksons, with respect to the Court's Summary Order filed December 27, 1996, a copy of which Summary Order is attached hereto as Exhibit A, insofar as the Summary Order is dispositive of the appeal of the Jacksons.

The appeal of the Jacksons was ordered previously by this Court to be consolidated with appeals herein by other Appellants. In this Petition for Rehearing, the Jacksons do not seek rehearing as to any Appellants other than the Jacksons, nor as to any appeal other than the Jacksons' appeal.

THIS COURT'S SUMMARY ORDER FAILED TO ADDRESS THE JACKSONS' ARGUMENT AS TO "SETTLED CLAIMS" UNDER THE CLASS SETTLEMENT RELEASE

In the Jacksons' Supplemental Brief and the Jacksons' Supplemental Reply Brief herein, the Jacksons argue, *inter alia*, that their claim against Appellee Prudential Securities Incorporated ("PSI"), based upon PSI's failure to supply the class notice and mailing administrators with the Jacksons' address

last-known to PSI, for use in sending the Jacksons notice of the pendency of the class action and of the Jacksons' right to opt out of the class action, is not a matter within the "Settled Claims", as the term "Settled Claims" is defined by the parties' Settlement Agreement (A 71).[1]

Consequently, such claim of the Jacksons was not agreed, by the parties' Settlement Agreement, to be released in settlement of the class action. Further, the District Court's Order No. 44, as amended (A 1523, A 1677), erroneously fails to permit the Jacksons to maintain their said claim in a pending arbitration proceeding against PSI, based upon PSI's failure to supply and utilize the Jacksons' said last-known address.

The Jacksons argued the above points, including the Jacksons' citation of dispositive precedent of this Court of Appeals and of the District Court for the Southern District of New York, within the Jacksons' Supplemental Brief and Supplemental Reply Brief. The Jacksons' argument on this point was not discussed, nor was the Jacksons' argument on this point decided, by the Summary Order.

THE DISTRICT COURT ERRED IN NOT PERMITTING THE JACKSONS TO MAINTAIN A CLAIM IN THE JACKSON ARBITRATION BASED ON PSI'S FAILURE TO PROVIDE THE JACKSONS' KNOWN, CORRECT ADDRESS

Numbered paragraph 6 of the District Court's Class Order compromised and resolved "Settled Claims" against PSI, and enjoined the prosecution of any "Settled Claims" against PSI (A 645). The Class Order also provided that capitalized terms used therein would be given the meaning defined in the parties' Settlement Agreement (A 641). The Settlement Agree-

---

[1] Parenthetical references are as follows, unless otherwise specified: References to "A", followed by a page number, are references to the parties' Joint Appendix on appeal; References to Appellants' Supplemental Briefs are designated "App. Supp." and the Appellants' names, followed by a page number.

ment, in turn, defined "Settled Claims" in its numbered paragraph 21 (A 71) as follows:

> "21. 'Settled Claims' means any and all claims, rights or causes of action or liabilities whatsoever, whether based on federal, state, local, statutory or common law or any other law, rule or regulation, including both known and unknown claims, that have been, could have been, or in the future might be asserted in any forum by the Class Members or any of them or the successors and assigns of any of them, whether directly, indirectly, representatively, derivatively or in any other capacity, against any of the Released Parties, in connection with or which arise out of or relate in any way to *the allegations, transactions, facts, matters or occurrences, representations or omissions involved, set forth or referred to in the Consolidated Complaint*, or which relate in any way to *the marketing, purchase, sale or holding of Units or other interests in*, or to *the operation, oversight, monitoring or management of, any of the Partnerships during the Class Period*." (emphasis added)

Thus, reduced to its essence, the definition of "Settled Claims" refers to any of a number of legal claims, described in the first one-half of the above lengthy definition: (1.) Which are in connection with, or which arise out of, or which relate in any way to, the *allegations, facts and other matters, involved or referred to in the Consolidated Complaint*; or (2.) Which relate in any way to the *marketing, purchase, sale or holding of Partnership interests during the Class Period*; or (3.) Which relate in any way to the *operation, oversight, or management of the Partnerships during the Class Period*.

The contracting parties' above definition of "Settled Claims" is a definition which is *stated with reference to the factual transactions or factual allegations* which are referred to in, and which underlie, the Consolidated Complaint: For example, alleged RICO violations, or alleged fraud in mar-

keting of Partnership interests. The Consolidated Complaint was described by the District Court as follows:

"C. The Consolidated Complaint.

. . . . .

"14. Count I of the Consolidated Complaint alleges RICO violations under 18 U.S.C. § 1962(c) and a civil RICO conspiracy under 18 U.S.C. § 1962(d) . . . Count I also serves as a model for pleading thirty-four additional RICO violations under 18 U.S.C. § 1962(c) and thirty-four violations under 18 U.S.C. § 1962(d) that follow the same pattern as Count I but substitute the different groups of conspirators, RICO enterprises, and offering periods listed in Appendix H. Through a similar procedure, Count II asserts thirty-five RICO violations under 18 U.S.C. § 1962(a) and thirty-five violations of 18 U.S.C. § 1962(d). Counts III through V allege that all defendants named in the Consolidated Complaint conspired together to commit racketeering acts and to violate 18 U.S.C. §§ 1962(a) and (c). The remaining counts allege fraud (Count VI), negligent misrepresentation (Count VII), breach of fiduciary duty (Count VIII), breach of a third-party beneficiary contract (Count IX), breach of implied covenant (Count X), and violations of New Jersey's RICO statute (Count XI). Counts VI through VIII allege that nearly all of the defendants named in the Consolidated Complaint are jointly and severally liable for one another's torts. Count IX is directed exclusively at PSI while Count X is directed exclusively at Prudential Insurance. Count XI duplicates the first five federal counts, but is brought pursuant to an analogous state statute, N.J. Stat. §§ 2C:41-1 *et seq.*, that state's RICO statute. . . ." District Court's Findings of Facts and Conclusions of Law, Sec. II (C.) (14.). (A 592 *et seq.*, at para. 14.)

The Settlement Agreement, by its clear terms, was directed to claims arising with reference to the Partnerships' management, marketing and sale, and the RICO, fraud and other factual allegations and matters referred-to in the Consolidated Complaint. If language used by parties in a contract is unambiguous, a court must enforce the plain, ordinary and common meaning of those terms *as a matter of law*, without reference to extrinsic evidence. *John Hancock Mutual Life Insurance Company v. Amerford International Corporation*, 22 F.3d 458, 462 (2nd Cir. 1994); *Chrysler Capital Corporation v. Bankers Trust Company*, 810 F. Supp 74, 76 (S.D. N.Y. 1992).

Any failure of PSI to give the Class Counsel the Jacksons' accurate address, last-known to PSI, for mailing the Jacksons the Class Notice of the class membership hearing in this proceeding, is *not* any of the types of matters defined as a "Settled Claim" in PSI's Settlement Agreement. Such a PSI failure is not a matter in connection with, arising out of, nor related in any way to alleged RICO or other wrongs, nor facts nor other "matter involved in or referred to in the Consolidated Complaint."; It is not a matter "related in any way to the marketing, purchase, sale or holding of the Partnership interests during the Class Period"; And it is not a matter "related in any way to the operation nor management of the Partnerships during the Class Period".

The clear direction of the settlement release, to the alleged RICO and other wrongs, and other factual matters underlying the Consolidated Complaint, is shown by the language the settling parties used, and by the treatment they gave these matters, in their Settlement Agreement. Under the heading "*TERMS AND CONDITIONS OF THE SETTLEMENT*", on Page 11 of the Settlement Agreement (A 75), the settling parties make provision for various terms, including, in numbered paragraph 34 thereof, the basic agreement to settle (*Ibid.*). Thereafter, commencing on Page 21 of the Settlement Agreement (A 85), in an entirely separate discussion, are provisions entitled "*CLASS CERTIFICATION CLASS NOTICE, AND SETTLEMENT FAIRNESS HEARING*". Indeed, PSI's duty to

provide putative Class members' addresses and other information is contained in yet another separate section of the Settlement Agreement, entitled "*MISCELLANEOUS*" commencing on Page 25 (A 89). The clear meaning of the parties' contract terms is that matters of "Class certification, class notice and the Settlement Fairness Hearing" are treated separately and distinctly from the parties' basic agreement to settle the dispute, and the matters which the settlement is to resolve.

Alternatively, PSI's duty to provide a correct address of the Jacksons, known to PSI, for use by Class Counsel in mailing notices in this litigation, may be viewed as arising pursuant to the District Court's "'Preliminary Order in Connection with Settlement Proceedings" (A 184 *et seq.*):

> ". . . The PSI Settling Defendants shall cooperate in making their books, records and information available to Lead Class Counsel or their agent for the purpose of identifying and giving notice to the Class." (A 191)

Indeed, the parties' settlement contract illustrates the distinction which that contract makes, between the "Settled Claims" to be settled thereby, and, by contrast, other matters in execution of the litigation settlement. The two matters—the "Settled Claims" and the other duties—are spoken of separately, at the conclusion of the same sentence:

> "45. The obligations of the Class Members and the PSI Settling Defendants under this Settlement Agreement shall be in full settlement . . . of the Settled Claims . . . and the Released Parties shall have no other or further liability or obligation to the Class . . . with respect to the Settled Claims except to fulfill the obligations created hereunder." (A 84) (emphasis added)

Given the unambiguous language which the settling parties used in limiting the settlement release to the RICO, fraud and other factual allegations contained in the Consolidated Com-

plaint, the plain meaning of the parties' chosen language should be applied. As this Circuit Court of Appeals stated in a prior case:

> "Language whose meaning is otherwise plain is not ambiguous *merely because the parties urge different interpretations in the litigation.* (citation omitted) The court should not find the language ambiguous on the basis of the interpretation urged by one party, where that interpretation would 'strain [ ] the contract language beyond its reasonable and ordinary meaning.' (citation omitted)
>
> *"The parties' rights under an unambiguous contract should be fathomed from the terms expressed in the instrument itself rather than from extrinsic evidence as to terms that were not expressed or judicial views as to what terms might be preferable. . ." Metropolitan Life Insurance Company v. RJR Nabisco, Incorporated*, 906 F.2d 884, 889 (2nd Cir. 1990). (applying New York law) (emphasis added)

John Hancock Mutual Life Insurance Co. v. Amerford International Corp., supra; *Natwest USA Credit Corp. v. Alco Standard Corporation*, 858 F. Supp. 401 (S.D. N.Y. 1994).

The plain meaning of the Settlement Agreement, and the single and only meaning of which said definition is susceptible, is that "Settled Claims" are defined as claims having reference to the RICO, fraud and other factual matters alleged in, and underlying, the Consolidated Complaint, and with reference to PSI's marketing and management of its Partnerships. This unambiguous meaning thus excludes, by its express terms, the Jacksons' claim against PSI based on PSI's provision of a known-incorrect address for the Jacksons, and the District Court erred in prohibiting the Jacksons from bringing an arbitration claim based on PSI's deliberate use of an incorrect address for the Jacksons.

CONCLUSION; RELIEF SOUGHT

The Jacksons respectfully request this Court rehear this matter as to the Jacksons' appeal, and reconsider this Court's said Summary Order as to the Jacksons' appeal, as to this Court's failure in said Summary Order to address the Jacksons' argument concerning "Settled Claims" in relation to the parties' Settlement Agreement in this matter, all as described hereinabove and in the Jacksons' previous Supplemental Brief and Supplemental Reply Brief, and that the District Court's Order No. 44, as amended, be modified as requested in the Jacksons' previous Supplemental Brief and Supplemental Reply Brief, and for such other and further relief to which the Jacksons might show themselves to be entitled.

Respectfully submitted,
FERGUSON & COMPANY, P.C.,

By: JEROME H. FERGUSON, III
Jerome H. Ferguson, III
SBOT No. 06925400
300 Embassy Court
624 N. Good-Latimer Expressway
Dallas, Texas 75204-5850
Voice: 214/824-5555
Fax: 214/823-3888

Supreme Court, U.S.
FILED
JUN 20 1997
OFFICE OF THE CLERK

(3)

No. 96-1732

In The

Supreme Court of the United States

October Term, 1996

MCDANIEL JACKSON and MIRIAM JACKSON,

Petitioners,

v.

IN RE: PRUDENTIAL SECURITIES INCORPORATED LIMITED PARTNERSHIP LITIGATION, MDL DOCKET NO. 1005,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

JEROME HOWARD FERGUSON
Counsel of Record for Petitioners
FERGUSON & COMPANY, P.C.
300 Embassy Court
624 North Good-Latimer Expressway
Dallas, Texas 75204-5850
Telephone 214/824-5555
Fax 214/823-3888

DOUGLAS D. DARNOLD
FERGUSON & COMPANY, P.C.
Dallas, Texas
Of Counsel

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

16 pp

QUESTIONS PRESENTED

1. Whether due process was denied the Petitioners, in that notice of class action *pendency* and of *opt-out rights* was *not* given to the last-known address of the Petitioners nor their counsel, contrary to the *individual notice* and "reasonable effort" required for due process and required by the District Court's Orders governing class notice, although the Respondents knew the address used for the Petitioners was not accurate, knew the Petitioners' accurate mailing address, and knew that the Petitioners were represented by counsel in a pending arbitration against the Respondents.

2. Whether due process was denied the Petitioners, in that the proceedings below incorrectly evaluated the adequacy of the giving of notice to the Petitioners, as to class *pendency* and class *opt-out rights*, by the more lenient notice standards of *settlement*.

3. Whether the Circuit Court of Appeals erred by its use of an "abuse of discretion" standard, instead of making a *de novo* review of the Petitioners' Fed. R. Civ. P. 60 (b)(4) Motion, which Motion alleged the class Final Judgment was void, as to the Petitioners, because due process was not provided to the Petitioners in that *no* notice of class action *pendency* nor of *opt-out rights* was given to the Petitioners' last-known address.

LIST OF PARENT COMPANIES

Petitioners refer to the "LIST OF PARENT COMPANIES" appearing at Page ii of their Petition for Writ of Certiorari. There are no amendments to be made to said list to make it current, as to Petitioners.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARENT COMPANIES..... ii

TABLE OF CONTENTS..... iii

TABLE OF CITED AUTHORITIES..... iv

PETITIONERS' REPLY TO BRIEF IN OPPOSITION ... 1

INTRODUCTION..... 1

QUESTION I..... 3

QUESTION II 7

QUESTION III..... 8

CONCLUSION 10

TABLE OF CITED AUTHORITIES

Page

CASES

Brennan v. Midwestern United Life Insurance Co., 450 F.2d 999 (7th. Cir. 1971), *cert. den.*, 405 U.S. 921 (1972) 9, 10

Browder v. Director, Department of Corrections, 434 U.S. 257 (1978) 9, 10

Burns v. Elrod, 757 F.2d 151 (7th Cir. 1985) 6

Daily Mirror v. New York News, 533 F.2d 53 (2nd Cir. 1976), *cert. den.*, 429 U.S. 862 (1976) 10

Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974) 1, 2, 6, 7, 8

Greenfield v. Villager Industries, Inc., 483 F.2d 824 (3rd Cir. 1973), *reh. den.* 483 F.2d 834 (1973) 2, 5

Gross v. Barnett Banks, 934 F. Supp. 1340 (M.D. Fla. 1995) 6

Grunin v. International House of Pancakes, 513 F.2d 114 (8th Cir. 1975), *cert. den.*, 423 U.S. 864 (1975) 7

In re Nissan Motor Corporation Antitrust Litigation, 552 F.2d 1088 (5th Cir. 1977) 2, 6

In re Prudential Securities Incorporated Limited Partnerships Litigation, 164 F.R.D. 362 (S.D.N.Y. 1996) 8

Lujan v. National Wildlife Federation, 497 U.S. 871 (1990) 9

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) 1, 2, 6, 7, 8

Peters v. National Railroad Passenger Corporation, 966 F.2d 1483 (D.C. Cir. 1992) 5

TABLE OF CITED AUTHORITIES – Continued

Page

Phillips Petroleum Company v. Shutts, 472 U.S. 797 (1985) 1, 2, 8

Presidential Life Insurance v. Milken, 946 F. Supp. 267 (S.D.N.Y. 1996) 8

Schwarzschild v. Tse, 69 F.3d 293 (9th Cir. 1995), *cert. den.*, ___ U.S. ___, 116 S.Ct. 1355 (1996) 2, 9

Valente v. Pepsico, Inc., 89 F.R.D. 352 (D. Del. 1981) 7

RULES

Fed. R. Civ. P. 6 .....8, 9

Fed. R. Civ. P. 23(b)(2)..... 6

Fed R. Civ. P. 23(b)(3).....6, 7

Fed. R. Civ. P. 23(c)(2)..... *passim*

Fed. R. Civ. P. 23(e) 6, 7

Fed. R. Civ. P. 60(b)(4)..... i, 5, 8, 9, 10

TREATISES AND OTHER MATERIALS

Despite S.E.C. Accord, Prudential Fights On, New York Times, Nov. 4, 1993, at 1, col. 3 2

Insurer Struggles to Resolve Sales-Practice Litigation, as Many Units Stumble, Wall Street Journal, January 24, 1997, 1997 Westlaw-WSJ 2406979..... 2

Tobacco Faces Year of Courtroom Drama, Wall Street Journal, February 10, 1997, 1997 Westlaw-WSJ 2408924 2

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

INTRODUCTION

Prudential's Brief in Opposition[1] is remarkable – for factual misrepresentations throughout, and pervasive ignoring of the legal requirements, notably Fed. R. Civ. P. 23(c)(2) class "best notice practicable", and "reasonable effort" for class member identification. The case citations of Prudential are, uniformly, inapposite.[2]

Prudential is non-responsive in substance to the Jacksons' arguments. Prudential would have strict Civil Rule 23(c)(2) pendency and opt-out notice, of *Mullane, Eisen* and *Phillips Petroleum*[3] and similar cases, applied solely in judicial discretion, if, when, and as the presiding judge might order it.

Petitioners directly urged to the Second Circuit, in Briefs and oral argument, their point, "THE NOTICE PROVISIONS, AS ENFORCED IN THIS CASE, DID NOT COMPORT WITH DUE PROCESS REQUIREMENTS".[4]

In spite of this, Petitioners' concerns were ignored. App. Toland 10-11. The Second Circuit Summary Order focussed only on claimed "excusable neglect" (App. Toland 6). It did not state a word as to "reasonable effort" – if any – of

---

[1] This Reply is made by, and on behalf of, solely the Jackson Petitioners as to Prudential's opposition to their Petition.

[2] Petitioners' last two Questions deal purely with legal standards wrongly-applied to Petitioners by the Circuit Court, or uncorrected by the Circuit Court. Prudential's claim this is "fact-specific" is undiluted sophistry.

[3] *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974); *Phillips Petroleum Company v. Shutts*, 472 U.S. 797 (1985) (Rehnquist, J.).

[4] Joint Brief of Appellants, 3, 43-48; Supplemental Brief of Jacksons, 3-5; Joint Reply Brief of Appellants, 14-23; Supplemental Reply Brief of Jacksons, 3.

Prudential (App. Toland 10-11, and 1-23). This summary treatment is directly in conflict with the rigorous procedures of the Fifth Circuit, *In re Nissan Motor Corporation Antitrust Litigation*, 552 F.2d 1088 (5th Cir. 1977) (herein, "*Nissan*"), and the Third Circuit, *Greenfield v. Villager Industries, Inc.*, 483 F.2d 824 (3rd Cir. 1973), *reh. den.*, 483 F.2d at 834, (herein, "*Villager*"). As the Circuits are in conflict, certiorari is proper.

The Second Circuit's use of an "abuse of discretion" standard, and lack of *de novo* review (App. Toland 6, 10-11) conflicts with the Ninth Circuit's *de novo* review required for Rule 23(c)(2) construction, *Schwarzschild v. Tse*, 69 F.3d 293, 295 (9th Cir. 1995), *cert. den.*, ___ U.S. ___, 116 S.Ct. 1355 (1996). As the Circuits are in conflict, certiorari is proper.

As to such a summary analysis in Petitioners' case: If such chicanery – *sending a Class pendency and opt-out notice to Petitioners, in care of yourself, the Defendant, without proven, timely notice effort* – is an "everyday, garden variety, prototypical notice program" (Br. Opp. to Jackson 8-9; Br. Opp. to Toland 21), such phony notice-giving is so great a departure from due process under *Mullane, Eisen* and *Phillips Petroleum* as to necessitate certiorari.

Prudential's claim of Petitioners' due process concerns as "parochial" ignores the obvious point: Reasonable pendency and opt-out notice is key, setting apart Rule 23(c)(2) from all other class notice rules, to extinguish individual suits. Prudential has used multiple class actions, defensively, to terminate many cases; This strategy may also be practiced by other industries, right now.[5]

---

[5] *Despite S.E.C. Accord, Prudential Fights On*, New York Times, Nov. 4, 1993, at 1, col. 3; *Insurer Struggles to Resolve Sales-Practice Litigation, as Many Units Stumble*, Wall Street Journal, January 24, 1997, 1997 Westlaw-WSJ 2406979.

See also *Tobacco Faces Year of Courtroom Drama*, Wall Street Journal, February 10, 1997, 1997 Westlaw-WSJ 2408924.

The adequacy, and corresponding proper execution, of pendency and opt-out notice procedures ought to be a significant concern to this Court. Correcting a lack of "reasonable effort", as such lack occurred for Petitioners, will ripple out, throughout class actions, far beyond impact as to only these two Petitioners. The "cert-worthiness" of correcting Prudential's, and/or Lead Class Counsel's, deliberate disregard for Rule 23(c)(2) opt-out notice procedures -- an egregious violation of Petitioners' due process – is clear.

I.

THE "BEST NOTICE PRACTICABLE" WAS NOT GIVEN PETITIONERS, AND "REASONABLE EFFORT" WAS NOT USED TO GIVE NOTICE OF PENDENCY AND OF OPT-OUT RIGHTS TO THEM

Prudential has not shown in its Brief how mailing pendency and opt-out notice, to Petitioners, *in care of Prudential itself* (App. Jackson 81-83), was the "best notice practicable" for Petitioners, nor use of "reasonable effort" to identify Petitioners and their address. This is especially-troubling, with the non-use (and the non-explanation, for non-use) of Petitioners' change of address, notice which Petitioners gave almost one year earlier – Notice which Prudential never denied receiving. (App. Jackson 84).

Prudential's claim that it later gave timely notice – evidenced by its Nittolo Affidavit, which does *not* state any mailing *date* nor mailing *address* for Petitioners (App. Jackson 88-89; *Cf.* Pet. 17 n. 5), is an effort to change the subject. It is no proof of giving Constitutional opt-out notice. (The Nittolo/Prudential mailing – whenever it happened – also violated the District Court's Class Order, requiring *Lead Class Counsel* to mail notice by a date certain. Pet. 18; App. Jackson 7.)

Prudential falsely re-casts the "Question Presented" as to the Jacksons (Br. Opp. i), as to a specious "burden of

proof" of not having *received* notice (Prudential contradicting its own claim, that receipt of notice does not matter!). Prudential tries to change the subject: By trying to shift attention onto everything and everyone, downstream of, and other than, where Civil Rule 23(c)(2) requires attention be placed: *viz.*, the "reasonable effort" – or not – used to identify Petitioners.[6]

Petitioners already have discussed (Pet. 7-9, 16-19) the old "direct investment" database, and its lack of nexus: To Prudential records used for other, routine, monthly mailings, and to other persons' changes of address (Pet. 8; *Cf.* Pet. 24,

---

[6] During the tape-recorded appellate hearing, the Second Circuit did ask Prudential:

> "But wasn't it based on the assumption that the notice would go to the last-known address?"

To which, Prudential's Supreme Court counsel, with hardy candor, replied: "*No, your honor.*" (emphasis added)

The Second Circuit also briefly questioned Prudential's Supreme Court counsel, as to the much-touted "direct investment" database. Prudential's Supreme Court counsel elusively described it as:

> "*That list is what it is;* It was not prepared for the EDAP; *It was not prepared for the SEC; There's no record evidence* that it was two years out of date *or anything else; It is what it is . . . There is no more recent list . . .* "(Emphasis added).

Such a Prudential sham, instead of Constitutional due process, should be disavowed by this Court. Moreover, Prudential's statement (no more-recent list) is at odds with Prudential's seeming use, for some address changes here, of its own, other records. *Cf.* Pet. 8; Pet. 24 n. 6; App. Toland 29, 31.

Further, Prudential's quoted statement, yesterday, to the Circuit Court, that the database was "not prepared for the SEC", is not what Prudential says, today (Br. Opp. 4 n. 3, last sentence).

n. 6) engineered by Prudential.[7] Petitioners' year-old address-change notice went un-used. App. Jackson 84.

In its Brief, Prudential is, surprisingly, silent as to all such matters.[8] Such exceptional trickery – mailing of pendency and opt-out notice, addressed to oneself, the settling Defendant – corrodes Civil Rule 23(c)(2) opt-out notice, which is targeted to binding, permanent resolution of litigant claims. *Cf. Villager, supra; see also* Pet. 15-16.[9]

Prudential would excuse an easily-forseeable error – the litigation parties' use of *Defendant's own business office name and address*, for pendency and opt-out notice.[10] App. Jackson

---

[7] That 1,099 changes of address – and many more – were given by Prudential to the mailing-label-printer [App. Toland 31, 29] belies the misrepresentation, by Prudential's Supreme Court counsel, in speaking to the District Court on Petitioners' Rule 60(b)(4) Motion, that:

> " . . . the mailing list that was used by Prudential . . . something called direct investment database . . . *was the most recent and current database available to Prudential* . . . " A-1442. (Emphasis added)

[8] Prudential failed to offer any record cite for its unproved statement (Br. Opp. to Toland 23), that its "direct investment" database contained "virtually all" Class members (A point left out of its Brief opposing the Jacksons): Presumably, if that evidence were in this record, Prudential would cite it – over and over again.

[9] In apparent total candor, Prudential's Supreme Court counsel spoke to the District Court as to Prudential's strong motives:

> " . . . Prudential *who is the primary proponent of getting people into this settlement* . . . " A-1441. (Emphasis added)

[10] *Cf. Peters v. National Railroad Passenger Corporation*, 966 F.2d 1483 (D.C. Cir. 1992) (Mailed to residence address, lacking apartment number; "Not reasonably forseeable" that address was incomplete, without an apartment number.)

81-83. Petitioners never pled to "verify" and "re-verify" all addresses, for "100% accuracy": *Petitioners pled only for Prudential reasonably to use the data it has.* Pet. 11-12, 19; App. Jackson 84. Using readily-available addresses, or data already-possessed by the sender, is sufficient to cut off valuable property rights. If that information is non-used, as here, due process is not provided, in forfeiture nor other cases – running from *Mullane* (itself a forfeiture case) and *Eisen,* through many, many other cases. Pet. 14; 18-20.

Although Petitioners specifically stated an issue of proper Rule 23(c)(2) *pendency* and *opt-out* notice law – not incorrect Rule 23(e) *dismissal* or *compromise* notice (Pet. at i, 20-24) – Prudential still cites only inapposite, settlement-notice cases. Prudential's case, *Gross v. Barnett Banks,* 934 F. Supp. 1340 (M.D. Fla. 1995) (Br. Opp. 13 n. 7) was decided on incorrect precedent; *Gross* should be disregarded.[11] Prudential's reference (Br. Opp. to Jackson 12, referring to Br. Opp. to Toland 22), except for *Mullane* and *Eisen,* ignores the inappositeness, or else the thrust, of its cited cases; As to those cases, *see* Jacksons' Pet. 24. Except only for the proper decision of *Nissan, supra,* Prudential's collection of cited cases[12] are inapposite to Petitioners, or else actually support Petitioners.[13]

---

[11] *Gross* turned on (934 F. Supp at 1345), and cited for support, *Burns v. Elrod,* 757 F.2d 151, 154 (7th Cir. 1985). *Burns* dealt with a Rule 23(b)(2) class (*Ibid.,* at 152) – Unlike the instant Rule 23(b)(3) Class, thus not subject to strict Rule 23(c)(2) notice. Moreover, *Burns* was expressly-decided under Rule 23(e), *judicially-discretionary* notice. *Id.,* at 154.

[12] Br. Opp. to Jackson at 12: Prudential's citing to its Br. Opp. to Toland at 23 including n. 22 therein.

[13] *Gross, supra,* decided on *inapposite precedent;* Another case, approving notice sent to "open" mortgage class members, *using addresses possessed by the Defendant;* A case of *no dispute* that notice procedures were *properly-followed;* A case of *entirely-*

Prudential has cited (Br. Opp. to Toland 23, n. 22) the stunningly-inapposite *Valente v. Pepsico, Inc.*, 89 F.R.D. 352, 363 (D. Del. 1981): A case of *late-filed claims; Mullane, Eisen* and Civil Rules 23(b)(3) and 23(c)(2) are *not even mentioned.* Prudential's lack of legal precision is obvious, and appalling.

II.

THE PROCEEDINGS BELOW INCORRECTLY JUDGED THE ADEQUACY OF NOTICE OF CLASS PENDENCY AND NOTICE OF OPT-OUT RIGHTS, AS TO PETITIONERS, BY THE MORE LENIENT STANDARDS OF CLASS SETTLEMENT NOTICE

Prudential misrepresents Petitioners' second Question (Br. Opp. 13-14 n. 8). Prudential falsely implies the District Court gave no great weight to Civil Rule 23(e) judicially-discretionary notice law (applicable only to class *dismissal* or *compromise*).

The District Court Opinion is as Petitioners stated it; Reading the District Court Opinion will show it to be so. Pet. 20-24; App. Jackson 53-55, 57-58. The District Court mentioned *Mullane* and *Eisen*, but placed its *emphasis* on cases expressly-decided on Rule 23(e) *settlement* notice principles. Pet. 21-22. *The District Court adopted language stating the court's discretion* – adopted from *a Rule 23(e) settlement notice* opinion, *Grunin v. International House of Pancakes*, 513 F.2d 114, 121 (8th Cir. 1975), *cert. den.*, 423 U.S. 864 (1975). (*The District Court also relied on other settlement notice cases.* Pet. 21-22; App. Jackson 54.) Prudential's argument – that Petitioners "distort" the District Court Opinion, by Petitioners' quoting it – should not be taken seriously.[14]

---

non-U.S.-resident Plaintiffs, of whom *one-half could never be identified*, holders of "bearer" bonds; and a hard-to-define cattle industry class, with *no single list/source of names.*

[14] Prudential's assertion – as to *Grunin* relying on *Eisen* – misses the point. *Grunin* is a Rule 23(e) *settlement* case. 513 F.2d

The District Court's application of *judicially-discretionary settlement* notice law, instead of mandatory "best notice practicable" Rule 23(c)(2) *pendency* and *opt-out* notice doctrine, was the application of a wrong legal standard to Petitioners. The District Court's own comprehension of what it did is shown by its citing its own Prudential case, in another recent case:

> " . . . These courts have held class members bound to class action *settlements* even where notice was sent to outdated addresses despite the defendants' possession of updated address information. See .-. . *Prudential*, 164 FRD 369-70 . . . " *Presidential Life Insurance v. Milken*, 946 F. Supp. 267, 278 (S.D.N.Y. 1996) (Pollack, J.) (emphasis added)

This citation to *Prudential* is to the District Court's "Incorrect Address" Opinion denying relief to Petitioners. (App. Jackson 42, 57-58) Thus, the District Court evidenced its own understanding: It was applying more-lax *settlement* notice standards to Petitioners, not the rigorous standards required as to *pendency* and *opt-out* notice.

III.

THE CIRCUIT COURT OF APPEALS ERRED BY NOT MAKING *DE NOVO* REVIEW, AND INCORRECTLY APPLIED AN "ABUSE OF DISCRETION" STANDARD, IN REVIEW OF PETITIONERS' FED. R. CIV. P. 60 (b)(4) MOTION MADE ON VOIDNESS AND DUE PROCESS GROUNDS

Petitioners stated that Civil Rule 6 grounds, "excusable neglect", are one of two grounds on which Petitioners pled

---

at 114, 121. The instant District Court relied on *Grunin* for judicially-"discretionary" powers. That is an improper standard, under *Mullane, Eisen, Phillips Petroleum* – and Rule 23(c)(2).

alternately. Pet. 25-26. Prudential prefers use of Rule 6. However, Prudential ignores that Petitioners also urged Rule 60(b)(4) grounds (" . . . the judgment is void . . . ") – and only subsection (b)(4), and no other of Rule 60 – consistently, throughout both the District and appellate courts. Pet. 25-26; App. Jackson 68, 70, 91, 93, 94.

Rule 60(b)(4) analysis, "voidness", necessarily *must* be rigorous, *not* as to "abuse of discretion". The reason was described previously (Pet. 28): Analyzing pendency and opt-out notice, by reference to a "discretionary" standard, as these lower courts did, *corrupts a mandatory notice standard, into a discretionary one.* Such discretion is improper. Pet. 28-29. *De novo* review as to Rule 23(c)(2) is required. *Schwarzschild v. Tse, supra,* 69 F.3d at 295.

The two cases cited by Prudential are, again, inapposite. One Prudential citation[15] considers a Civil Rule 6 – not Rule 60 – motion, inapposite to Question III herein and to due process.

Prudential's second citation[16] is not dispositive. That opinion, *Browder,* expressly was *not* decided on Rule 60(b), and certainly not subsection (b)(4). 434 U.S. at 263 n. 8. Thus, *Browder* offers no support. Moreover, the precedent in *Browder,* for this Court's view that a Rule 60(b) motion is reviewed for abuse of discretion (*Id.,* at 263), actually supports Petitioners.[17] *De novo* appellate review, made in *Brennan* – a case cited by *Browder* – was not given Petitioners.

---

[15] *Lujan v. National Wildlife Federation,* 497 U.S. 871, 895-6 (1990).

[16] *Browder v. Director, Department of Corrections,* 434 U.S. 257, 263 n. 7 (1978) (herein, "*Browder*").

[17] *Brennan v. Midwestern United Life Insurance Company,* 450 F.2d 999 (7th. Cir. 1971), *cert. den.,* 405 U.S. 921 (1972), on a Rule

Use, or not, of "reasonable effort" to identify Petitioners and send opt-out notice, is *never* mentioned by the Circuit's Summary Order. App. Toland 10-11, 1-23.[18]

CONCLUSION

For the reasons above and in their Petition, granting of certiorari, vacating the appellate Summary Order, and rendering judgment in Petitioners' favor, excluding them from this Class, is appropriate. Thus, Petitioners again respectfully urge this Court to grant certiorari.

Respectfully submitted,

JEROME HOWARD FERGUSON
Counsel of Record for Petitioners
FERGUSON & COMPANY, P.C.
300 Embassy Court
624 N. Good-Latimer Expressway
Dallas, Texas 75204-5850
Telephone 214/824-5555
Fax 214/823-3888

DOUGLAS D. DARNOLD
FERGUSON & COMPANY, P.C.
Dallas, Texas
Of Counsel

60(b)(4) Motion for class members' relief: The court in *Brennan* gave, in effect, a *de novo* review. 450 F.2d at 1003-1005.

The other opinion underlying *Browder, Daily Mirror v. New York News*, 533 F.2d 53 (2nd Cir. 1976), *cert. den.*, 429 U.S. 862 (1976), is fully-distinguishable. *Daily Mirror* was a non-specific Rule 60(b) Motion, with no due process discussion – on dismissing Plaintiff's lawsuit for want of prosecution, dormant four years. Petitioners here actively seek arbitration against Prudential, for its deliberate fraud (App. Jackson 66).

[18] Prudential wishes that its claim of Second Circuit *de novo* review (never mentioned in the Circuit Summary Order, nor recounted in Prudential's Brief), by alleged full questioning at the tape-recorded oral argument, were correct (but Prudential thus concedes *de novo* review is proper on a Rule 60(b)(4) Motion).